MISSISSIPPI LAW JOURNAL

SYMPOSIUM: NO-FAULT AUTOMOBILE INSURANCE

THE CASE FOR NO-FAULT INSURANCE
Robert E. Keeton

NO-FAULT FACT, FICTION, AND FALLACY
Craig Spangenberg

IMPLEMENTING THE NO-FAULT CONCEPT: AN ANALYSIS OF SOME ALTERNATIVES
Richard N. Pearson

THE UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT
Roger C. Henderson

NATIONWIDE NO-FAULT
Warren G. Magnuson

THE MASSACHUSETTS EXPERIENCE UNDER NO-FAULT
Eugene G. Coombs, Jr.

THE IMPACT OF NO-FAULT ON THE UNDERWRITING RESULTS OF MASSACHUSETTS INSURERS
Dr. Calvin H. Brainard

VOLUME 44 **JANUARY 1973** **NUMBER 1**

MISSISSIPPI CODE
and CODE GUIDE

VOLUMES

1 2 3 4
5 6 7 8 9

Now Ready...
Direct From
Atlanta, Ga.!

Harrison Will Ship 3 Volumes Every 60 Days,
Until The '72 Code Is Complete (22 Volumes)

THE HARRISON COMPANY, PUBLISHERS

178 - 180 Pryor Street • Atlanta, Georgia 30303

Call us any time . . . for services rendered by Mississippi's largest Trust Department. We at Deposit Guaranty National Bank welcome the opportunity to work with attorneys in serving the needs of their individual and industrial clients. Services are offered in matters involving trusts, wills, estates, pension programs and retirement plans. Call us at any time . . . we look forward to hearing from you.

TRUST DEPARTMENT
DEPOSIT GUARANTY NATIONAL BANK
GROW WITH US/JACKSON, MISS./MEMBER F.D.I.C.

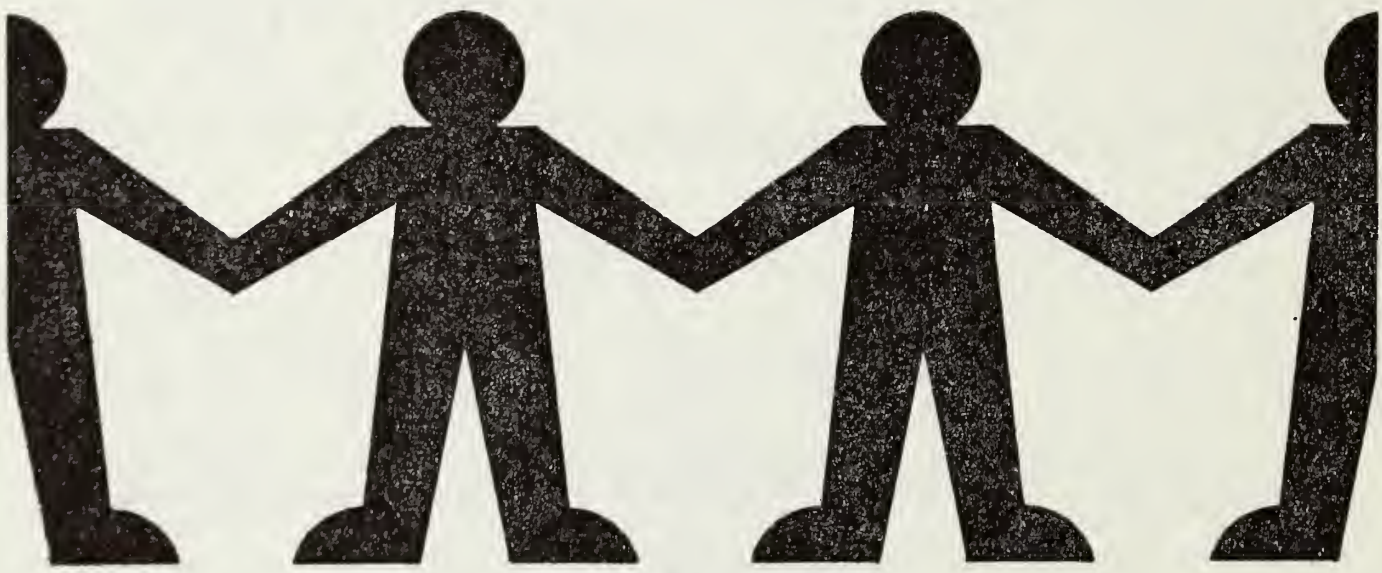
If you have the JOURNAL, you need the INDEX!

MISSISSIPPI LAW JOURNAL CUMULATIVE INDEXES

New Index for Volumes 31-40	$ 6.00
Index for Volumes 21-30	2.50
Index for Volumes 1-20	2.50
Complete Set of Above Indexes	$10.00

Send order to:

MISSISSIPPI LAW JOURNAL
P. O. Box 146
University, Mississippi 38677



Teamwork. Mid-South Title's National Department works hand-in-hand with Mississippi attorneys in real estate title matters—an important reason we lead the league in the Mid-South. Sole agent for Commerce Title Guaranty Co.

MID-SOUTH TITLE COMPANY
12 South Main Street Memphis, Tennessee 38103
W. J. "Bill" Gallagher, Vice Pres. 901/523-8121

MST

CORPUS JURIS SECUNDUM is probably the greatest guess eliminator available to the legal profession.

Already being used to eliminate guesswork in thousands of offices throughout the country, it can do the same in your office.

Consider some of the ways guesswork can be eliminated in your search for the law . . .

- **Coverage of the law is thorough.**
- **Case citations provide primary source material.**
- **Library References lead you to other sources of the law.**

Why not broaden your law finding base . . . and eliminate guesswork . . . through CJS. The next time your West representative calls ask him how easy it is to become a CJS owner.

WEST PUBLISHING COMPANY

FRANK R. MARTIN, P. O. Box 1781, Jackson, Mississippi 39205, Phone: 601/362-2096

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 44 JANUARY 1973 NUMBER 1

Copyright © 1973, Mississippi Law Journal

CONTENTS

SYMPOSIUM: NO-FAULT AUTOMOBILE INSURANCE

INTRODUCTION

THE CASE FOR NO-FAULT INSURANCE ..... *Robert E. Keeton* 1

NO-FAULT FACT, FICTION, AND FALLACY ..... *Craig Spangenberg* 15

IMPLEMENTING THE NO-FAULT CONCEPT: AN ANALYSIS OF SOME ALTERNATIVES ..... *Richard N. Pearson* 74

THE UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT ..... *Roger C. Henderson* 107

NATIONWIDE NO-FAULT ..... *Warren G. Magnuson* 132

THE MASSACHUSETTS EXPERIENCE UNDER NO-FAULT ..... *Eugene G. Coombs, Jr.* 158

THE IMPACT OF NO-FAULT ON THE UNDERWRITING RESULTS OF MASSACHUSETTS INSURERS ..... *Dr. Calvin H. Brainard* 174

The MISSISSIPPI LAW JOURNAL is published by University of Mississippi law students five times annually in January, April, June, September, and November. Editorial and business offices: Mississippi Law Journal, P. O. Box 146, University, Mississippi 38677.

Current subscription: $10.00 per year. Single issue, $2.50. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Members of the Mississippi State Bar send address changes to the Mississippi State Bar, P. O. Box 1032, Jackson, Mississippi 39205. All other subscribers send address changes directly to the Mississippi Law Journal. Include name, new address (including zip code) and old address. Please notify 45 days in advance to insure prompt delivery.

Unless a claim is made for non-receipt of Journal issues within six months after the mailing date, the Mississippi Law Journal cannot be held responsible for supplying those issues without charge.

Citations conform to *A Uniform System of Citation* (11th ed. 1967), copyright by the *Columbia, Harvard,* and *University of Pennsylvania Law Reviews* and the *Yale Law Journal.*

The Mississippi Law Journal is a member of the National Conference of Law Reviews.

Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL of LAW

VOLUME 44 JANUARY 1973 NUMBER 1

MEMBERS OF THE LAW JOURNAL-LAW SCHOOL LIAISON COMMITTEE

LOWELL E. GRISHAM, *Chairman*
Oxford

JAMES HUGH RAY, *Vice-Chairman*
Tupelo
JOEL BLASS
Gulfport
HUGH N. CLAYTON
New Albany
ROBERT W. ELLIOTT
Ripley
WILL A. HICKMAN
Oxford
LESTER F. SUMNERS
New Albany
JOEL P. WALKER, JR.
Hernando

MISSISSIPPI STATE BAR
1972-73

OFFICERS

TALLY D. RIDDELL of Quitman.....President
JOE H. DANIEL of Jackson.....President-Elect
JOSEPH R. MEADOWS of Gulfport.....Second Vice-President
GEORGE VAN ZANT of Jackson.....Executive Director and Secretary-Treasurer

COMMISSIONERS

JAMES H. RAY.....Tupelo
NORMAN BRELAND.....Gulfport
GERALD A. GAFFORD.....Oxford
P. J. TOWNSEND, JR.....Drew
JOHN E. SHAW.....Kosciusko
JAMES E. WILKERSON, JR.....Woodville
JEROME B. STEEN.....Jackson
GEORGE MONROE.....Newton
WREN C. WAY.....Vicksburg
ELZY J. SMITH.....Clarksdale
MARIE P. KEPPER.....Hattiesburg
ALEITA M. SULLIVAN.....Mendenhall
R. PEARCE PHILLIPS.....Brookhaven
SEBE DALE.....Columbia
THOMAS J. TUBB.....West Point
GEORGE P. COSSAR, JR.....Charleston
LEONARD MELVIN, JR.....Laurel
CHARLES R. MCRAE.....Pascagoula

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL of LAW

VOLUME 44 | JANUARY 1973 | NUMBER 1

EDITORIAL BOARD

KENNETH W. BARTON
Editor-in-Chief

ROSS F. BASS, JR.
Assistant Editor

E. SPIVEY GAULT
STEPHEN L. THOMAS
Article Editors

JOHN P. PRICE
LUTHER S. OTT
Research Editors

GEORGE R. FAIR
DAVID E. WILDER
Note Editors

JAMES E. BLACKBURN, JR.
Business Manager

E. GLENN KOURY
Comment Editor

JOHNNIE M. HALEY
Index and Review Editor

LEO J. STEVENSON
Special Projects

GEORGE C. COCHRAN
Faculty Advisor

STAFF

Lawrence E. Allison, Jr.
Kenneth D. Barfield
John W. Beam, Jr.
Joel W. Bunkley, III
Marlane E. Chill
Claude F. Clayton, Jr.
Julie Ann Epps
Robert T. Gordon, Jr.
Bob Hammond
John P. Henson
L. C. James
Jon A. Jennings
Robert E. Jones
Walker W. (Bill) Jones
John H. Kettlekamp
Nick Leonard
George R. Lyles
David S. Raines
S. T. Rayburn
William H. Shaheen
Lester F. Smith
William Dean Stark
Patrick Taylor
Wendell H. Trapp, Jr.
Robert H. Walker
William B. Wicker
William L. Youngblood

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

INTRODUCTION

Much of the American legal thinking in the 20th century has been directed toward criticism of the tort concept of "fault-negligence." Widespread dissatisfaction among legal scholars has led to a variety of plans and proposals which would adequately compensate the accident victim while producing meaningful deterrence to wrongdoers. Some of these proposals found their way into law; the most notable have been the uniform adoption of workmen's compensation laws and the widespread adoption of compulsory insurance plans. In the area where tortious conduct has its most significant social and economic impact—automobile accidents—no satisfactory solution has yet been found. However, the most recent no-fault automobile insurance proposals, embodied first in the Massachusetts Personal Injury Protection Act of 1970, have captured the imagination of the American lawyer and layman as none before. Since 1970, some type of no-fault automobile accident plan has been adopted in five states, and similar legislation is pending in most other states, including Mississippi. Recently, a proposal for a national no-fault automobile insurance system was defeated by a narrow margin in the United States Senate.

The purpose of this special symposium issue of the *Mississippi Law Journal* is not to endorse either a fault or no-fault compensation system, but rather to make available to lawmakers, members of the Bar, law students, and general public the seasoned insight of leading authorities into the complexities of the no-fault automobile insurance question.

Our goal is to present not only an analysis of the basic question of fault or no-fault, but also to emphasize the concomitant question of "if no-fault, which no-fault?" The decision to enact a no-fault system of compensation is only the beginning. Scope of coverage, liability limitations, and mechanics of operation present unlimited possibilities for tailoring no-fault plans to fit local priorities. Careful study and analysis are crucial in these areas. The seven authors appearing in this symposium highlight the major problems and offer scholarly discussion supporting and opposing no-fault, presenting various state and federal plans, and analyzing the Massachusetts experience under no-fault. Although much has been written on no-fault in other legal periodicals, there is a continuing need to examine and reexamine the theoretical and practical concepts of no-fault, especially now that experimentation has begun in several states.

THE CASE FOR NO-FAULT INSURANCE

*Robert E. Keeton**

I. The Need for Reform

The case for no-fault automobile insurance is founded on a demonstrated need for reform of the fault-based automobile accident reparations system. The shortcomings of that system are severe. The body of published materials identifying and documenting those shortcomings is now so extensive that few among even the most interested inquirers would wish to examine it all. The need for reform is presented here in capsule form—in eight quoted points,[1] together with brief explanatory comments.

> First. The negligence system is an incomplete system of reparation. It leaves victims themselves to bear much accidental loss that could easily be paid through insurance. It denies recovery altogether to some injured persons, and it underpays others. Moreover, the system would be subject to even more severe condemnation on this ground of incompleteness if it were faithful to its underlying theories of basing liability on negligence and denying recovery because of contributory negligence (or, in a growing number of states, proportionately reducing recovery on this ground).[2]

Those who defend the tort system against this charge that it leaves many victims of traffic accidents uncompensated often do so on the ground that it is not the purpose of the tort system to compensate every victim. Indeed, they say, it is deliberately aimed at denying compensation to those victims it classifies as undeserving. But this defense misses the point that when we inquire whether a system serves us well we should be asking not only whether the system measures up to its own aims but also, more fundamentally, whether its aims are what they should be. Thus, though not conclusive of the whole question as to whether

---

*Professor of Law, Harvard University. B.B.A. 1940, LL.B. 1941, University of Texas; S.J.D. 1956, Harvard University. I gratefully acknowledge that many of the ideas presented here were developed in the Study of Automobile Claims Systems in which Professor Jeffrey O'Connell was my colleague. In preparing this article, I have drawn freely on the report of that study, published as R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance (1965).

[1]The eight points are quoted from Compensation Systems—The Search for a Viable Alternative to Negligence Law 2-3 (1971) [cited hereinafter as Compensation Systems], reprinted from P. Keeton & R. Keeton, Cases and Materials on the Law of Torts 458-59 (1971).

[2]P. Keeton & R. Keeton, *supra* note 1, at 458.

reform is needed, it certainly is relevant that when measured not by its own underlying premises but instead *as a system for compensating accidental loss* sustained in traffic accidents, the tort system leaves many victims uncompensated. This fact of incompleteness—lack of any compensation to many traffic accident victims and compensation in amounts less than out-of-pocket losses to many others—has been confirmed by numerous empirical studies.[3]

> Second. The negligence system is inequitable. It heavily overpays some claimants while underpaying others who are equally or more deserving. It is especially unfair in overpaying those with trivial injuries and underpaying those who are most severely injured. Moreover, the unfairness of the system extends also to the way it allocates the burden of paying for the costs of the system.[4]

The pattern of compensation in sums many times out-of-pocket losses for minor injuries and compensation in sums even less than out-of-pocket losses for severe injuries was established empirically as early as the Columbia study published in 1932.[5] It has been confirmed over and over again in subsequent studies.[6] These inequities, as between those sustaining minor injuries and those sustaining severe injuries, are condemned not only from a perspective outside the fault system, but also under the criteria of the fault system itself. That is, these documented findings about how the tort system works in fact demonstrate that its practical performance is contrary to its own basic theory.

We need not search far to find the explanation for this practical deviation from the theory of the system. It lies to a large extent in the

---

[3]*See, e.g.*, 1 & 2 U.S. DEP'T OF TRANSP., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES (Report of the Westat Research Corp. 1970).

[4]P. KEETON & R. KEETON, *supra* note 1, at 458.

[5]COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

[6]*See, e.g.*, A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS—STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964); HUNTING & NEUWIRTH, WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS (1962); LINDEN, THE REPORT OF THE OSGOOD HALL STUDY ON COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS (1965); 1 & 2 U.S. DEP'T OF TRANSP., *supra* note 3; Adams, *A Comparative Analysis of Costs of Insuring Against Losses Due to Automobile Accidents—Various Hypotheses—New Jersey, 1955*, TEMPLE U. ECON. & BUS. BULL., March, 1960, at 3; Adams, *A Survey of Economic-Financial Consequences of Personal Injuries Resulting from Automobile Accidents in the City of Philadelphia, 1953*, TEMPLE U. ECON. & BUS. BULL., March, 1955, at 3; Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961); James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70 (1952); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

fact that virtually every claim under the fault system has a substantial nuisance increment to its value. This is not to say that most paid claims for minor injuries are strictly nuisance claims and nothing more. It is to say, however, that not only minor claims which have little if any merit, but also minor claims that truly have merit are commonly settled for much more than they are worth on the merits. The claimant and the liability insurer do not often settle for a figure that represents an average of educated guesses about how the case would come out if it were tried. Instead, the settlement figure is ordinarily substantially higher because of this nuisance increment to the value the claim would have strictly on the merits.

The reason for the nuisance increment is that it would cost the insurance company far more to defend against a small claim than to pay it. For example, it would cost several times as much to fight a claim all the way through the courts as to settle it for $750. Cases in which the out-of-pocket loss is less than $100 and the claimant is represented by an attorney are on average settled for more than seven times the out-of-pocket loss.[7] Note that this is an *average*. A poor case on fault settles for a lower multiple, and a good case on fault settles for a higher multiple. In both instances, however, the victim with a minor injury is treated relatively generously while the victim with precisely the same kind of claim under fault criteria but a really severe injury must face the uncertainties of trial unless he is willing to accept a settlement that bears a substantially lower relation to his out-of-pocket losses.[8] The extraordinarily disproportionate multiples of out-of-pocket losses are not explained by the fault of the insured defendants, or the pain and suffering of the victims, or the undue generosity of insurance companies, or even all these things combined. Rather, this happens because every meritorious claim has a nuisance increment to its value, and even the claims without merit have a substantial "nuisance" value. It is futile to blame claimants, or lawyers, or insurance companies for this demonstrated fact about the way the fault system works. The fault is in the system. It is the system that is in need of reform rather than the people who operate it.

> Third. The system is too slow in delivering the payments it makes. Such delay adversely affects rehabilitation of injured per-

---

[7] *See, e.g.*, AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS, Exhibit X (1968).

[8] *Id.* For economic loss from $1 to $100 the multiple is 7.14; from $501 to $1,000, 2.88; from $5,001 to $10,000, 1.82; over $10,000, 1.36. Out of this settlement the injured person must pay his attorney's fee. Thus, the net he retains is often less than his out-of-pocket losses in the cases involving the most severe injuries.

> sons and increases the overall social costs of accidents. Disputes over fault and over amounts due as lump-sum damages commonly delay compensation for months in cases that are settled and still longer in cases that are tried. In most metropolitan areas the average delay for trial is more than two years, and in some areas it is more than five years. The burden of these negligence cases on the courts also adversely affects court dockets and the administration of justice in other cases as well.[9]

It bears emphasis that there are two distinct aspects of this characteristic of delay inherent in the fault system. One concerns the burden on the judicial system; it falls far more heavily on urban centers and states with high concentrations of cars and people than on other communities and states. The other aspect of delay strikes everywhere. This aspect is underlined by the recognition among trial lawyers that it is often desirable, under the tort system, to delay trial even though the docket of the court in which the case is pending would permit relatively early trial. The tort system is founded on the principle of a lump-sum award—deciding on judgment day what the claimant's future will be, though we know our guesses will be wrong one way or the other. In that system, it may sometimes be in the plaintiff's best interest to delay trial so as to reduce the risk he suffers that the factfinder will underestimate his future disability. But meanwhile the tort system provides nothing for him. He cannot be assured of proper medical treatment, and he cannot be assured of sustenance for his family when he is a disabled breadwinner awaiting trial of his disputed tort claim. By reason of its delays, then, the compensation that the tort system provides for the period before trial comes too late to serve the important function of providing for severly injured victims and their families during the period when it is likely that the medical needs will be greatest and the necessity for readjustment most agonizing.

> Fourth. The negligence system is wastefully expensive. Administrative cost is high because of the nature of the two principal criteria for compensation—requiring, first, case-by-case determinations of fault and, second, lump-sum findings of damages under indeterminate guidelines. The net amount that victims receive is less than half of the liability insurance premium dollar. A large part of the premium dollar—approximately a fourth—is expended in claims administration cost. The disproportionately high expense of administration is especially severe in cases of small claims, which constitute a heavy majority of all claims filed.[10]

---

[9] P. KEETON & R. KEETON, *supra* note 1, at 458.

[10] *Id.*

With the publication of the American Insurance Association Cost Study in 1968,[11] it became possible to calculate somewhat more precisely than before just where the automobile bodily injury liability insurance dollar goes. The breakdown follows:[12]

General Overhead		33 cents	
Claims Administration Cost			
Defense Side	13 cents		
Claimants' Side	10 cents		
Total Claims Administration Cost		23 cents	
Total Overhead			56 cents
Net Amount Paid to Victims Above Losses (in theory for pain and suffering)		21.5 cents	
Paid to Compensate for Losses Also Compensated from Other Sources (including income tax saving)		8 cents	
Paid to Compensate for Losses Not Compensated from Other Sources		14.5 cents	
Net Paid to Victims Altogether			44 cents
			100 cents

> Fifth. The system encourages routine exaggeration of claims and even outright fraud both in relation to damages and in relation to issues of negligence. This has severe consequences not only for the legal system but also for the individuals who are caught in its gears.[13]

The prevailing practice of settling claims for minor injuries at extraordinarily high multiples of out-of-pocket loss has an impact in turn on the way a claimant is likely to describe his injuries. This system, as it actually functions, has powerful incentives to exaggeration of injuries. Since the claim, to be plausible, must also charge that someone else was at fault and, preferably, that the claimant was entirely free from fault, there is also an inherent incentive to remember the accident in a way that places blame entirely on another. This incentive affects both the claimant and the other person whom he charges with fault. In combination with a natural tendency to blame somebody else rather than oneself for any untoward event, this produces a striking disparity between the number of drivers who are at fault in accidents and the

---

[11] *See* note 5 *supra*.

[12] For more detailed explanation of each of the figures appearing in the text, *see* COMPENSATION SYSTEMS, *supra* note 1, at 57-63.

[13] P. KEETON & R. KEETON, *supra* note 1, at 458.

number who will admit it, even when confronted with the question under oath.

> Sixth. Even if defensible in other contexts, negligence is an impractical and unrealistic criterion of liability in a large percentage of automobile accident cases. Moreover, practical pressures for compensation through insurance distort the application of negligence concepts even to cases in which fault could be ascertained.[14]

There are some kinds of accidents in which fault can be determined easily. An example is the case of the drunken driver running a stop sign and striking a pedestrian in the crosswalk. There are other cases in which fault is difficult to ascertain. An example is the case of disputed right-of-way in which, months or years after the accident, opposing counsel and their witnesses attempt to reconstruct the relative movements of vehicles during a two-second time interval. The relative percentage of the hard and easy cases is a matter of great dispute, but it is at least clear that the hard cases are a large percentage of all automobile accident cases. It is also clear that the practical functioning of the system tends to dispose of easier cases by settlement and select the harder cases for trial, thus emphasizing and displaying the impracticability of fault as a criterion for dealing with the entire problem of entitlement to compensation for traffic injuries.

> Seventh. The liability insurance that is an integral part of the system is a basically unsatisfactory product. It is unattractive to consumers both because it returns such a low percentage of the premium dollar in net benefits and because it fails to measure up to what the public generally, not understanding its limitations, tend to expect of it. In turn, public dissatisfaction makes it difficult for insurance companies to obtain regulatory approval for premium rates that are adequate and equitably distributed among different types of policyholders. Moreover, if rates are too low, either in general or for some classes of policyholders, this tends to cause insurance to become unavailable to a part of the public, or available only at great inconvenience.[15]

Many opponents of reform have argued that increasing insurance costs and intolerable abuses in cancellations and nonrenewals of insurance coverage are problems independent of and unrelated to the shortcomings of the fault system. This point of view fails to take account of the fact that public pressures to hold down insurance costs will be more

---

[14] *Id.*

[15] *Id.* at 458-59.

severe when the public receives relatively little in return than these pressures would be if the bargain were a better one. These public pressures to hold down costs inevitably increase practical pressures on insurers to engage in more selective underwriting in order to preserve their profits in the face of increasing costs. Thus, although reform of the fault system will not alone solve problems of availability of insurance—and the associated problems of excessive cancellations and nonrenewals—no satisfactory resolution of cost and availability problems can be achieved without basic reform of the criterion of compensation.

> Eighth. The negligence system, including the liability insurance that has become an integral part of it, is self-contradictory in theory and self-defeating in practice. Negligence law has been twice overlaid with developments fundamentally in conflict with the aim of making wrongdoers pay for their wrongdoing. These developments move toward, first, making sure that wrongdoers are protected by liability insurance from having to pay for their wrongdoing and, second, making sure that victims of automobile accidents are compensated from some source, regardless of fault.[16]

In the early stages of its evolution, the fault system was founded on the premise that the individual held legally accountable for his fault would also pay the judgment out of his own assets. The ineffectiveness of that system as a practical matter led to the development of liability insurance. The inconsistency between liability insurance and the basic premise of making the wrongdoer pay was perceived from the first. Liability insurance was attacked as contrary to public policy. But the attack failed, and society's interest in assuring compensation has led to such massive development of liability insurance that, at present, over 99 percent of all tort judgments in traffic accident cases are paid not by the individual wrongdoers but instead by liability insurers or by corporations or enterprises large enough to function as self-insurers.

The time has come to construct a modern system for compensation of traffic victims that is founded candidly on the need for efficient and fair reimbursement of accidental losses occurring on the highways. We are already committing adequate resources to the task through the tort-and-liability-insurance system, but that system wastes a large percentage of those resources and unfairly distributes much of the remainder. With an improved system, we could take the same resources and accomplish prompt, fair, and effective compensation for losses incurred by traffic victims.

---

[16] *Id.* at 459.

II. A Sketch of Some Common Elements in No-Fault Insurance Proposals

No-fault automobile insurance proposals are many and varied, but through them all runs one common theme. They make use of a form of insurance, now identified as no-fault insurance, that under other names is the most ancient of all known concepts of insurance. It is at least as ancient as the fraternal societies of early civilizations. This concept is basically the same idea that is the essence of life insurance, health and accident insurance, and fire insurance. It is the concept that the criterion for determining whether benefits shall be paid will be whether the claimant has suffered a loss from the type of accident described in the insuring clause of the policy.

One of the implications of this criterion is that fault is irrelevant to determining rights to compensation. A completely separate issue is the question whether fault will be relevant to determining responsibility for paying premiums into the system.[17] Certainly there is a lack of consistency on this second issue among the many proposals for no-fault insurance. But they are consistent on the first issue of using a criterion for benefits that is the no-fault criterion—the straightforward insurance principle.

Most of the varied proposals referred to as no-fault plans have in common some other implications as well. It is explicit or implicit in most such proposals that no-fault insurance will be first party insurance—that is, that the claim for benefits of the injured person will ordinarily be a claim against his own insurance company with no third party involved. Such a claim stands in contrast with the typical claim under the liability insurance coverage in which there is a third party, the other driver, and in which the theory of the system is that benefits are being paid on his behalf; the insurance of the other driver is, in form at least, designed to protect his assets against inroads incident to his liability based on his fault.

In practice, of course, automobile liability insurance has in fact been used for a purpose of assuring compensation to victims rather than simply to protect the assets of wrongdoers. Thus, the present system has developed complications incident to a practical use for a different purpose than the underlying theory.[18]

---

[17]For more extended development of this point, *see, e.g.,* COMPENSATION SYSTEMS, *supra* note 1, at 70-71; Keeton, *Basic Protection and the Future of Negligence Law,* 3 U. RICHMOND L. REV. 1, 16-17 (1968).

[18]For more extended development of this point *see, e.g.,* NEW YORK STATE INS. DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 44-48 (1970).

In contrast with this very ancient concept of no-fault insurance, liability insurance is relatively recent in origin. It was invented only in the 19th century. It first came into vogue as a form of insurance designed to protect the employer against the consequences of what is called "employers' liability"—that is, liability of the employer for injuries to his workmen. This occurred at a time before workmen's compensation had been developed.

Of course, the moment the automobile came upon the scene and its propensities for causing injuries to others became apparent, the liability insurance concept was quickly adapted to the automobile risk.

Liability insurance, then, is a relatively recent concept. In moving toward no-fault insurance for the compensation of traffic victims, we are not abandoning the wisdom of centuries as so many opponents of no-fault insurance have argued. Instead, we are simply returning to a more ancient wisdom—the concept of straightforward insurance.

Another idea common to most no-fault insurance proposals is that benefits will be paid periodically rather than in one lump sum. In the tort-and-liability insurance system, it is customary for compensation to be determined once and forever by a judgment in a single lawsuit or settlement. Predictions are made as to what the losses will be in the future, and, of course, those predictions are almost always wrong since it is practically impossible to predict the future accurately. In contrast, no-fault insurance proposals would provide for the payment of losses as they occur, in most instances month by month.

In some plans there are also provisions for special methods of adjudicating disputes and provisions for objective criteria of compensation for things beyond medical expense and wage loss. On these matters there are substantial variations among the different plans.

In summary, there is a sharp contrast between the no-fault principle and the fault principle of the present system. Under the fault system, typically, claims are made against the other driver's insurance company, based on negligence, seeking a lump-sum payment. This payment, if obtained, ignores — and therefore overlaps with — reimbursements already received from other sources, such as Blue Cross and sick-leave pay. It also attempts to pay dollars for virtually unmeasureable claims—which, especially in the trivial cases, often amount to uncorroborated assertions of a "nagging headache" or a "pain in the back." No-fault insurance, in contrast, applies a straightforward insurance principle—the one already applied in health and accident insurance, in fire insurance, and even in the medical payments coverage and collision coverage of the automobile policy itself. Thus payments are typically made by one's

own insurer rather than the "other driver's" insurer. Also, they are made month by month, as losses occur, rather than in lump sum; and they reimburse only for net out-of-pocket loss, which ordinarily is objectively measurable and not likely to be a source of dispute.

III. An Attack on Waste

The term "no-fault insurance" came into use in the 1960's to signify a compensation system that couples the payment of benefits on a no-fault basis with the elimination of at least part of the fault-based tort actions for both economic losses and pain and suffering. A no-fault system, in this sense, may continue to permit fault-based claims for pain and suffering in the more serious cases, but it eliminates tort actions at least in cases of minor injury. The minor injuries are, of course, the more numerous by far. Thus, as a practical matter, even a tort exemption precluding only the claims based on minor injuries does away with a high percentage of claims based on fault.

The key impact of the tort exemption is to attack inequity and waste.

The inequity is most dramatically indicated by the common pattern of settlement of claims for minor injuries in extraordinarily high multiples of out-of-pocket losses and settlement of claims for severe injury in amounts bearing a substantially lower relationship to out-of-pocket losses.[19]

One form of waste built into the fault-based system concerns tax dollars the public pays to provide courts for the trial of these automobile accident cases. This burden in taxes runs even higher than the amount of the benefits delivered in tens of thousands of the less severe cases every year. Consider the cost to the public of providing a courtroom, a judge, an officer, a court reporter, clerks, clerical personnel, and a jury to spend two days or more trying a case in which, as happens in a high percentage of trials, the traffic victim wins a verdict of no more than $1,500, of which he receives less than $1,000 above his lawyer's fees and other expenses.

A second form of waste concerns insurance premium dollars. No more than 44 cents of the premium dollar comes back to the public as compensation to injured persons.[20] This means that policyholders are paying $2.25 in automobile liability insurance premiums for each dollar in net benefits returned to injured persons. And a large part of the

---

[19] *See* notes 5 & 6 *supra.*

[20] *See* note 8 *supra.*

reason for this low efficiency is the cost of controversy, investigation, and negotiation concerning all the multitude of small claims, together with the cost of full-dress trial in a number that are a small percentage of the total volume of claims, but enough to be a large percentage of court dockets.

Consider how great the savings in insurance costs can be. Under the negligence system, the endless and innumerable fights over fault and over how much pain is "worth" are items of great expense. These are eliminated in cases to which the tort exemption applies. The actual cost of paying for pain and suffering in the cases within the tort exemption is also eliminated. Since this often equals several times the out-of-pocket losses in the smaller cases of which there are so many, this means a very substantial saving. Also a no-fault plan may prohibit duplication of payments made from other sources such as sick leave or Blue Cross. In contrast, under the fault-based system payments are often made to cover losses already reimbursed from other sources. And the waste includes a heavy charge for the overhead of paying these duplicating benefits through an insurance system.

IV. Free Choice on Pain and Suffering Damages

In addition to effectively attacking inequity and waste, a wisely designed no-fault system also offers to those who desire compensation for pain and suffering as well as economic loss a better and fairer deal. Under the fault-based system, trivially injured victims receive several times as much compensation as their out-of-pocket losses. This is justified as pain and suffering damages, but in fact it is mostly the reflection of the nuisance increment to the value of claims because the fault issue and the amorphous, indefinite item of valuing pain and suffering make every claim potentially expensive to defend. In contrast with this overpayment for trivial injuries, many of those who suffer the most pain—the most severely injured victims—receive less than their out-of-pocket losses. Few among them receive more than a fraction of loss; thus they receive nothing extra for their pain. A well designed no-fault system does more for the severely injured person by guaranteeing payment of most of his out-of-pocket losses while preserving his right to recover in a negligence claim for his pain and suffering damages for the most severe injuries.

Under the fault-based system, if you buy any liability insurance at all, you are forced to pay the cost of pain and suffering damages, whether you like it or not. This is true because pain and suffering damages are part of the claim your insurance company pays to others,

not you, and it is not feasible to give you an option. In contrast, under a no-fault system, you can be given some freedom of choice about whether in your own system of values, adjusted to your own circumstances, pain and suffering damages are worth the cost.

V. Deterrents and Rewards

Some opponents of basic reform have argued, in various ways, that paying benefits without regard to fault would tend to make good drivers bad and bad drivers worse. A moment's thought will tell you that there is a basic assumption underlying all such arguments—the assumption that a person's driving habits depend to a significant extent upon how concerned he is about the effect of his carelessness on the automobile insurance claims that may result from an accident. Unless that assumption is sound, this whole structure of arguments falls like a house of cards. So let us examine that assumption.

The typical motorist fears the consequences of bad driving, no doubt. Consider your own attitude. Probably uppermost among your concerns of this type are fear of injury to yourself or to members of your family, fear of criminal fines for violating traffic laws, and fear of loss of your driver's license. If the combination of these fears will not stop you from taking unreasonable chances in driving, is it realistic to believe that your fear of being held legally responsible for any injuries caused to others by your negligence would turn the tide? And is it realistic to believe that you would be deterred from unsafe driving by the fear that such conduct would prevent you from being paid by another careless driver?

There are many reasons why, as a driver, you would seldom, if ever, pause to think about these possible legal consequences.

One of these reasons, standing alone, serves to make the point. You cannot even reach the threshhold of thinking about the legal consequences of your carelessness until your mind admits that you are driving carelessly and that you may have an accident. But people are notoriously optimistic about not becoming accident statistics themselves, notoriously quick to blame another when an accident occurs, and notoriously generous in appraising the quality of their own driving. Thus it is fighting an uphill battle against human nature to base a campaign for safe driving on the fear of what will happen with reference to insurance claims.

But suppose for a moment we go along with the argument that providing insurance for traffic victims makes drivers less careful. If we

wanted to outlaw this assumed inducement to danger, we would have to outlaw *all* our insurance under the present system covering negligent use of the automobile. In short, the whole development of automobile insurance covering negligent use of the car runs contrary to the idea that it is worthwhile to try to make drivers more careful by making them pay personally for all the consequences of the accidents they cause.

Closely akin to the erroneous assumptions that the fault-based system deters bad driving is the assertion that a no-fault system would reward wrongdoers. In the first place, there is a curious contradition in defending liability insurance and at the same time arguing that insurance paying no-fault benefits rewards wrongdoers. The very theory of liability insurance is to "reward" *nobody but wrongdoers.* In other words, by its own theory liability insurance is designed not to benefit victims but to protect the assets of wrongdoers by paying claims against them on their behalf. Nor does the contradiction disappear if one takes the pragmatic view that, whatever its theory may be, liability insurance is really used more as a system for paying victims than as a system for protecting tortfeasors' assets. It still is the case that the funds with which a liability insurance company pays a victim were collected from thousands of premium payers, all but one of whom had even less to do with causing the victim's injury than the victim himself, however innocent he may have been. Moreover, the vast majority of these premium payers will have had no connection with *any* accident during the entire period for which their premiums purchased coverage. Thus, a liability insurance system protects the wrongdoer from the economic consequences of his own wrong with a fund collected from people even more clearly innocent than the innocent victim. If supporters of the fault-based system do not consider this "rewarding" wrongdoers, then a fortiori an insurance policy under which a policyholder collects from his own company, to which he has paid the premium for his own protection, is not "rewarding" wrongdoing or wrongdoers merely because it reimburses losses regardless of fault.

The time has come to make aid to victims of traffic accidents a primary objective. Moreover, we can wisely choose still to adhere to this objective even if it sometimes happens incidentally—though no longer as the fulfillment of a primary objective as under liability insurance—that losses suffered by wrongdoers are reimbursed. Also, we can do this and still avoid paying to victims—whether innocent or at fault—real profits such as the present system allows by permitting overlapping benefits and by encouraging nuisance settlements for claims of pain and suffering based on negligence.

Let it be emphasized that these points do not stand in opposition to merit rating and competitive rating. As already noted, you can pay claims to injured victims without regard to fault and still allow competition and a merit system charging higher rates to bad drivers. A no-fault system can work with or without competitive and merit rating, as the public prefers.

VI. Conclusion

The case for no-fault insurance arises from a demonstrated need for reform of the tort-and-liability insurance system and a manifest opportunity for establishing a better system founded on the no-fault concept.

The fault-and-liability insurance system of compensating for injuries arising from traffic accidents has serious shortcomings. It pays too little, too late, and at wasteful expense, and it inequitably distributes both the benefits it pays and the charges it assesses.

To match this demonstrated need for reform there is a manifest opportunity for dramatic improvements through the use of no-fault insurance. Costs of insurance under systems that couple no-fault benefits with a partial tort exemption have proved to be far lower than was generally predicted in advance of any experience under such a system. There continue to be wide variations in cost estimates, but the range of variation is narrowing and the zone of costs is becoming clearer. Accumulating experience under no-fault systems is thus giving us a better picture of what we might achieve through a well designed no-fault system. It seems probable that, using no greater resources than we would expend through automobile liability insurance and self-insurance arrangements if we continued to rely on the fault system, we could under a well designed no-fault system provide lifetime compensation for all victims of traffic accidents, subject only to reasonable internal limits (such as a weekly or monthly limit on compensation for wage loss) and with no overall limit on an individual's right to benefits. The advantages of a well-designed no-fault system are compelling.

NO-FAULT FACT, FICTION, AND FALLACY

*Craig Spangenberg**

Most people have opinions about no-fault insurance, but few people know the facts on which a rational opinion should be based. The purpose of this article is to discuss the available data on the operation of insurance systems and other risk protecting and compensation systems in the hope that, with the myths removed, an intelligent choice can be made. This discussion will begin with a basic primer of the insurance concept and the tort liability concept, and will then proceed to more complex analyses of the ways in which those systems actually operate.

I. The Insurance Concept

Insurance is an application of the mathematical laws of large numbers. Given a large enough class of random events, it can be predicted with considerable accuracy that certain events will happen with an average frequency and an average severity. If it can be stated that in a group of 1,000 persons in the course of a year one person will sustain a loss of $5,000, then the risk of that loss to each person can be said to have a value of $5 each. If all of those persons agree that after the loss, each one will chip in $5 apiece to pay the one person who had the large loss, this would be reciprocal insurance. It is uncommon, but does exist.

In order to avoid the uncertainty that all members would make proper contributions after the event, it could be agreed that each would chip in the risk value before the event. Only the member who had prepaid his share of the risk could draw reimbursement from the pool if the risk of loss materialized into actual loss inflicted on him. This is the common form of insurance.

The persons who collect the value of the risk in advance—the premium—will have expenses in acquiring, handling, and disbursing the money. In addition, they may advertise their service and pay commissions to their agents who bring in new risk-sharers. In the private insurance industry, for all forms of insurance, it is customary to collect about $8.50 in premiums in order to pay out a $5 risk of loss. As will be shown, many forms of no-fault first party insurance pay back to the claimants less than 60 cents for the premium dollar. Automobile liability insurance customarily pays a better percentage, something more than 60 cents on the dollar.

---

*A.B. 1935, J.D. 1938, University of Michigan. Partner, Spangenberg, Shibley, Traci & Lancione; Cleveland, Ohio.

It makes little difference to the insurer what causes the risk to occur. The loss may be imposed by the laws of nature, such as fire or flood; or it may be imposed by the legal system, such as liability insurance.

The person paying the premium is called the insured and is the "first party." The premium collector and loss payer, the insurance company, is the "second party." Typical first party insurance defines by contract the kind of loss that will be reimbursed, and states the amount or percentage of loss that will be paid. Fire insurance, life insurance, automobile collision insurance, Blue Cross hospitalization insurance, and automobile medical pay insurance are all familiar examples of this type.

It should be emphasized that the premium is designed to protect against a *risk* of loss. The policy holder does not expect to get any of his premiums back. He would much rather not suffer the loss at all. The homeowner who buys fire insurance will be happy if his home is never destroyed by fire, and he never receives any payment from the insurer.

Some no-fault proponents seem to think insurance premiums are like bank deposits, and the policyholder should be entitled to get back a substantial part of his premium. The automobile owner who never has an accident still receives the benefit for which he has paid—*i.e.,* protection against the risk that a specified loss will occur. Even if he suffers no loss, he has received the benefit of the protection.

Another type of insurance, liability insurance, is called "third party" insurance. As an example, the law of admiralty imposes upon a shipowner liability to compensate those who suffer loss of vessel, loss of cargo, or loss of life if the owner's ship violates the rules of the sea and rams another vessel. The shipowner may elect to bear that risk of loss alone, or he may join with other shipowners in paying a premium to an insurer which will spread the risk. The premium pool will reimburse to a particular owner the cost of his legal liability if his ship is at fault in imposing loss on a third party. In customary practice, the insurer will pay the loss directly to the third party, rather than compelling the liable owner to pay first and obtain reimbursement later. Manufacturer's product liability insurance, air carrier's liability insurance, hospital malpractice insurance, automobile property damage liability insurance, and bodily injury liability insurance are familiar examples of third party coverages. The victim suffering injury, damage, or loss—the third party—customarily deals with the insurer of the party inflicting the loss and negotiates settlement directly.

There is nothing inherent in either first party or third party insurance systems to make them either fair or unfair. Either kind can be

administered efficiently or inefficiently, honestly or dishonestly, with or without discrimination, and with or without delay. Under both types the insurance company will have sales and administration expense, and claims investigation, adjustment, and defense expense. Under both types the policy purchaser will be viewed as a natural "friend," but the claimant may be viewed with hostility.

It will be observed that the risk of loss in third party liability insurance is imposed by a legal system created by society to serve its sense of justice. The legal system has not been shaped or distorted to benefit and subserve the needs of the second party insurers, at least up until the present time. The general rule of law, developed from centuries of human experience, states that every citizen owes a duty to every other citizen to obey legislated rules of conduct and a duty to exercise a reasonable degree of care to avoid injuring his fellow citizens or damaging their property. The person who violates these rules of reasonable conduct is made liable, by force of law, to compensate the innocent injured victim for his whole loss. The individual (or corporation) may choose to purchase insurance to protect himself against the risk that his own assets and future earnings might be taken away to reimburse the innocent victim's loss if the law adjudged him to be the wrongdoer under the circumstances of a particular accident. The primary purpose of liability insurance is *not* to pay the victim, but to protect the policy holder against the risk of loss and the cost of defense. Whether this system is fair or unfair in operation will depend upon whether the law itself is fair or unfair.

Inequity in the legal system can be changed and improved without any change in the insurance system. It is also true that inequity and discrimination in an insurance system can be modified without any change in the legal system. Both first party and third party insurance systems can co-exist, affording to the individual both first party protection against his own loss and indemnification against his possible liability to a third party.

The fanatics of no-fault insist on the obliteration of a whole system of legal rights. They propose no new type of insurance. Every kind of first party, non-fault benefit included in any of the proposed no-fault plans is available in the voluntary private insurance market today. The great majority of all automobile drivers and occupants are already covered by wage continuation programs, sick leave, Blue Cross—Blue Shield, social security disability benefits, life insurance, automobile medical pay, or other forms of health and accident insurance. Some forms are efficient, others are inefficient. The least efficient, without question, is non-group health and accident insurance dealing with

individual cases of individual policyholders. It is just this kind of health and accident insurance that the no-faulters insist every automobile driver must buy from a private insurance carrier at the carrier's rates.

There is no reason why third party liability cannot co-exist with first party benefit insurance. They are parallel, not mutually exclusive systems. Auto property damage liability and auto collision insurance constitute a common example of co-existing fault and no-fault systems. No-fault proponents are likely to talk in terms of "pure" no-fault. This does not mean that the no-fault system is itself "pure." It is sales talk for the idea that all other systems should be abolished, leaving no-fault as the only available system and making it compulsory. The "pure" plan would obliterate the present legal rights of American citizens, and then compel them to buy back substitute rights from the private insurance industry.

The syllogism goes like this: "The public buys liability insurance. Liability insurance is intended to compensate the public. Some members of the public are not compensated at all, and some are not compensated adequately. Therefore, the insurance system should be changed so that absolutely no one is compensated fairly, but everyone will be compensated for part of his economic loss. The new system should compel everyone to buy economic loss insurance for his own good, whether he appreciates that it is for his own good or not. The insurance industry has a right to collect premiums from every automobile owner, and it will be more efficient to distribute the benefits on the basis of whose pocketbook was depleted instead of on the basis of who was right and who was wrong." The Mad Hatter would be proud of this logic.

II. Insurance Accounting Terms

A knowledge of the double-talk mysteries of insurance company accounting is essential to an understanding of the multiple no-fault proposals. In the language of insurance finance, "underwriting losses" can often be translated into substantial real profits, and the income produced by invested reserves can transform from income to "unearned surplus."

Let us assume a policyholder purchases today a combination of coverages good for a term of one year, for a premium of $120. The company enters on its books, as "earned premium," only $10. It assumes that it receives the 12 months premium only 1 month at a time. It will, of course, keep the additional $110 which it has actually received, but

will put it in a separate account called "unearned premium reserve." It will immediately enter as an expense the total agent's commission for acquiring and writing the business, which is larger than the first month's earned premium and will make the books show an "underwriting loss." At the beginning of the next month, the company will transfer another one-twelfth of the premium, $10 in the example, from "unearned premium reserve" to "earned premium (underwriting) income," which will reduce the "loss." The process will be repeated month after month, eventually showing income available to pay other expenses, and reducing the unearned premium reserve on that particular premium to zero in the twelfth month.

Assuming a continuing operation with steady inflow of premiums, nearly half of the annual premium intake will always be parked out in the unearned premium reserve. All operating expense, and all losses incurred are charged only against "earned premium" income in determining the "underwriting" profit or loss. The funds in the unearned premium reserves are invested or loaned at interest. In the same way a savings bank can earn a profit by paying depositors 5 percent interest on the depositors' money while lending that money out to others at a higher interest rate, so an insurance company can make money by lending out its "unearned premium reserves," particularly since it pays no interest to the policyholder for the use of his money in advance. The income received from the investment of the reserve is not entered on the books as operating income. It becomes, instead, "unearned surplus."

Let us assume now that a particular policyholder has an accident, and his insurer estimates that the factors of liability and injury make it likely the insurer will have to pay $2,500 to settle the claim. The case is "reserved" at $2,500, which means that a "loss incurred" is immediately entered on the books, to be deducted from "net earned premiums" in calculating underwriting profit or loss. The amount of $2,500, in the example, is transferred to the account called "loss reserve." Again, all the income earned from the investment of loss reserves is used, not to help pay losses, but to swell the "unearned surplus" account.

Let us assume now that the loss is in fact finally paid after sixteen months or so, but the actual settlement agreement is for only $2,000. the sum of $2,000 will be charged against the "loss reserve" account, as would be expected. The excess amount of $500, which was part of the $2,500 "loss incurred" and was treated as an expense at the time the reserve was created, must now be accounted for. One might expect that it would be returned to operating income so as to reduce the loss incurred and the underwriting expense, but this is not the case. The sav-

ings generated by settling for less than the "reserved" amount wind up in "unearned surplus," too.

The money in unearned surplus accounts is also invested to generate income, which is not considered to be operating or underwriting income. Curiously enough, the cost of running the investment department of the insurance company, which places the money in profitable ventures, is usually considered to be part of the "operating expense."

The name of the game is cash flow. The greater the premium income, even with no profit at all in the "underwriting" column, the greater the real earnings. There is no incentive for the industry to reduce premium levels. There is considerable incentive to avoid "pricing the product out of the market" once premiums approach the levels thought to be the maximum which consumers will pay.

Another "reserve," not as well known as the others, is the "loss incurred but not reported" (I.B.N.R.) reserve. In order to fix this reserve the company speculates that some policyholder has hit some other driver under circumstances where that driver might be injured and might make a claim next year or the year after next. The potential claim is unreported and unknown, but it might possibly exist and be made in the future. At the time when the claim is made, if ever, it will be reserved in the "loss reserves." The assumption is made that it ought to be reserved in the current year and charged as a loss against current premiums. The reserve which states the hazard of the future claim is called "loss incurred but not reported," or I.B.N.R. As the reader can now forecast, the investment income from the I.B.N.R. reserve goes to "unearned surplus."

The I.B.N.R. reserve is useful for other reasons. In any year in which "underwriting profits" are so large that state insurance commissioners might press the insurance company to reduce its premium rate, the company can speculate that it might have a huge number of unreported accidents and claims and greatly expand its I.B.N.R. reserves. The amount of the increase in the reserve becomes a "loss" in the operating figures, thus reducing the "underwriting profit." One of the major companies, in 1971, a very profitable year, did increase its I.B.N.R. reserve from $6 million to $50 million. It is possible to reevaluate both loss reserves and I.B.N.R. reserves every year, so as to reduce an apparent underwriting loss by lowering reserves or reduce an excessive underwriting profit by increasing reserves, depending on the need to placate stockholders, or insurance commissioners, or the agents of the Internal Revenue Service. For this reason, it is unwise to place too much reliance on a single year's operating statement, at least without a critical look

at changes in the reserves. Over a long range period the changes in reserves probably do balance out.

III. Check-List of No-Fault Provisions

There are a staggering number of no-fault proposals and variations. Well over a hundred different bills have been introduced in different legislatures. Major differences are discussed below.

A. Follow-the-Car vs. Follow-the-Family

Traditional liability insurance is written to cover a particular automobile, and gives its protection to any person who drives that car with the owner's permission. The policy also names the insured driver and protects him while he is driving another automobile. If that automobile is also insured, the policy on the automobile is "primary" and is first applied to the loss until it is exhausted, at which point the "secondary" coverage of the insured driver will be applied.

A few no-fault plans are written to follow the insured and his family, rather than the particular car. The named insured and members of his family are insured while riding in the insured's car, when they are pedestrians, or when riding in any other automobile, bus or taxi anywhere in the world. Variations allow the insurance applicable to the automobile itself to be primary for all passengers in the car, but the family's insurance still applies with secondary coverage.

The difference between follow-the-car and follow-the-family may not be remarkably significant to the individuals who are insured by either system. The concepts are important to insurance companies. "Follow-the-car" is now standard and gives few problems to the multitude of small companies who operate chiefly in one state or one small geographical area. About 90 percent of all accidents occur within 10 miles of the site where the car is principally garaged, so that a local company can readily investigate and adjust the bulk of its claims in the area where it operates.

The follow-the-family concept means that students away at college and adults away on business or pleasure trips will be covered by the home policy. A small, in-state insurance company will have to hire out-of-state adjustment companies to investigate more of its claims. The large stock companies, such as Aetna, which do business on a national scope and have offices in every major city, will be able to investigate the claims of its policyholders anywhere without contracting for outside assistance.

The American Insurance Association favors follow-the-family no-fault plans, and supports this version of the Uniform Motor Vehicle

Accident Reparations Act (UMVARA). The other insurance associations all favor the present follow-the-car system, which does not impose a competitive disadvantage upon them.

B. Primary or Secondary

The first party economic loss benefits which the particular plan sells for the compulsory premium may be described as "primary," paid regardless of other benefit plans the insured owns, or may be described as "secondary," to be paid only when other sources are exhausted.

If an insured has a no-fault policy which will pay hospital costs, but also has a Blue Cross contract, a "primary" no-fault policy will repay him the amount of his hospital bill even though he pays the hospital bill through his Blue Cross plan. If the no-fault policy is made "secondary" by the particular statute, then the insured might recover nothing from his automobile policy. The automobile policy will be secondary or excess, paying benefits only to the extent other health and hospital policies or other compensation systems such as Medicare, Medicaid and workmen's compensation do not pay them.

Those who argue that no-fault should be secondary are likely to say that no one should "profit" from his injury and that it will be cheaper to have a system which allows only one recovery. Those who argue for primary coverage point out that there is no double recovery unless a double premium has been paid. The consumer ought to get back the benefits he has paid for in a first party insurance system. If a man buys three different $10,000 life insurance policies, he expects his estate to collect $30,000 upon his death. Double or triple recovery is fair when the beneficiary has paid the premium directly or has earned it by his labor as a fringe benefit in lieu of wages.

Insurance industry spokesmen generally agree that secondary coverage would not be cheaper. If the insured is entitled to a lower rate if he has other primary coverages, the insurer will have to investigate the nature and extent of those coverages, will have to find guarantees that the insured will continue to keep those coverages in force during the life of his policy, and will have to investigate every claim for first party benefits to see whether at the time of loss there were collectable benefits available from all the various other sources. The cost of investigation would probably equal the premium saving which might otherwise be forecast in a secondary system.

At present, none of the insurance associations favor a secondary benefit system. They all prefer the simplicity and ease of premium calculation which inhere in the primary system. Some legislators have

proposed secondary payment no-fault in the misguided belief that such a system would cost less.

There are variations in secondary systems, of course. It may be provided that private insurance benefits are not deductible from no-fault benefits, but social security and workmen's compensation payments are primary and will not be duplicated by the automobile policy. This is the plan of the proposed federal act and the existing Massachusetts Act. It has not made the rates any cheaper for the workingman insured in Massachusetts.

C. Ceilings, Percentages, and Waiting Periods

The original promise of many no-faulters was that all losses of all victims could be paid at lower rates by limiting tort recoveries. It is now known that this is a financial impossibility. All plans propose a limitation of benefits in order to keep premiums within publicly acceptable bounds. Medical payment benefits are always limited to "reasonable and necessary" with deliberate vagueness as to who will determine in any given case what treatment is "necessary" and what level of hospital charge or medical fee is "reasonable." Some plans require unlimited "reasonable and necessary" medical, hospital, and rehabilitation expenses for life. Others have no dollar limit, but pay only expenses incurred within one, two, or three years. Others impose ceilings, requiring payment of medical expenses up to a maximum of $5,000, or $10,000, or $50,000. The ceiling on medical expenses may be separate or may be combined with a ceiling on wage loss.

Wage loss is subject to limited recovery in every plan so far proposed. The amount of wage loss recoverable may be controlled by a percentage limitation, such as 75 percent in the Oregon plan. An 85 percent limitation is most common. The plan may provide an income tax standard, limiting recovery to the gross loss less the income tax advantage if the wage loss repayment is not taxable. In addition to percentage limits, a ceiling is imposed by every plan. It may be $150 or $200 a week or $750, $800 or $1,000 a month. The plan may, or may not, require a waiting period of uncompensated wage loss for a certain number of work days before reimbursement will be made. Most plans pay the first dollar of wage loss, however, subject to the percentage limits and ceilings. There is no particular justification attempted to support the ceiling of $950 to $1,000 a month. A substantial number of employed persons, both blue and white collar, earn more than that. The numbers may be picked off computer runs by actuaries who try to tailor benefits to desired premium rates, or may be simply plucked out of the air by self-

proclaimed "liberals" who think that the stated level of income is enough for common folks.

D. Compulsory or Optional

Some plans call for first party benefits as a mandatory offer, with refusal permitted, to be sold in conjunction with any sale of a liability policy. Other plans call for compulsory insurance as a condition precedent to owning or driving an automobile. The rationale of the compulsory plan is that no-fault is so good for people they should be compelled to buy it, regardless of their particular needs or desires. Moreover, it will increase the cash flow and reserves of the insurance industry, which is good for them.

The rationale for making no-fault optional is that the insurer can select risks and give good drivers lower premiums if under no pressure to carry all the bad drivers, assigned risk plans, and assigned claims plans at rates the bad risks and assigned risks are willing to accept. Some insurers with a long range point of view can also foresee that if every motorist is compelled to buy the no-fault package, the motorists (who constitute a voting majority) may demand strict regulation and control of rates, making a public utility of the insurance industry; or motorists may demand state funds with their lower administrative costs.

E. Bodily Injury, Property Damage, or Both

Some plans regulate only personal injury losses. Others extend the no-fault system to physical damage to automobiles. When liability for property damage is abolished, then collision insurance rates must go up. The reason for this is that the collision insurer is presently subrogated to the rights of its insured, and expects to recover part of its collision losses by collecting back its payments from the property damage liability insurance of the wrongdoer.

The insurance company which loses its property damage liability premiums when no-fault abolishes liability can make up the cash flow difference from collision premiums. The person who is hurt by the change is the man who drives a 3 or 4 year-old used car. Collision rates are too high to make it worthwhile to insure the older car. The owner's chief protection against loss is to drive carefully, knowing that if he is in the right he can collect his repair bill or total loss from the driver in the wrong or from that driver's property damage insurer. With liability abolished, the driver of an older car must either stand the loss himself or buy high cost $100 deductible collision insurance and still absorb the first $100 of loss.

The statistics of the Department of Transportation (DOT) and the Insurance Information Institute show about 24 million cars a year damaged in collisions, with 42 percent of all collisions being rear end impacts on one of the cars standing at a light or stop sign, or waiting to make a turn. This means about 5 million cars a year all rear-ended when the driver is completely in the right. These 5 million drivers will, rightly, expect the man who hits them to pay. Their intense anger, when they find the legislature has decreed no liability for property damage, is something that should give pause to each legislator who studies the problem.

F. The Tort Exemption

The greatest variance among the many plans occurs in the definition of what class of persons can still bring an action in tort against the wrongdoer to recover full compensation. The American Insurance Association plan, the Nationwide Insurance Company plan, and the federal standard of the proposed national act, Senate bill 945,[1] all completely abolish the tort remedy for the driver and the passengers of the automobile hit by a lawbreaking driver. On the other hand, the Insurance Company of North America plan, the I.N.A. bill enacted in Delaware, imposes no limitation whatever upon anyone's tort remedy. Recovery in tort is somewhat limited by deducting the first party benefits received. The Oregon no-fault act similarly requires first party benefits, but does not impair the tort remedy. Maryland's recently enacted insurance reform plan calls for $2,500 in primary first party benefits, but neither impairs the traditional tort remedy nor deducts the benefits from the tort recovery. The Massachusetts, New Jersey, Connecticut, Florida and Michigan Acts all restrict, and partially abolish, the tort remedy by "threshold" limitations. The Illinois Act, which impaired the tort remedy by a formula limiting recovery of general damages, is no longer in force, having been held unconstitutional.

The thresholds are too varied to be cataloged. They may define the minimum threshold in terms of the amount of medical bills incurred before a tort suit can be brought, with $200, $500, $1,000 or $2,500 being the magic number, with or without hospital bills included, and with or without x-ray bills being included. Medical bill thresholds may be combined with verbal definitions, such as permitting suit for any permanent disability, only for permanent "significantly disabling" loss of function, for any fracture, or only for fracture of a "weight bearing

[1] S. 945, 92d Cong., 2d Sess. (1972).

bone." *Quaere*: is the skull a weight bearing bone, except in the case of Father William and the eastern yoga? Are the bones of the hand "weight-bearing," or only weight-carrying on some occasions?

A long-term temporary total disability may pass the threshold under some plans, such as UMVARA, particularly if the temporary disability is defined to require such horrendous magnitude that a considerable degree of permanent disability would surely result.

Generally speaking, the threshold plans are computer games. If first party benefits are limited to $2,000 or $2,500, then probably enough claims will drop out of the tort system, by natural disinclination to press for damages in addition to the bills paid, to result in little premium change. If first party benefits are payable at the level of $7,500 or $10,000, then tort recoveries must be restricted (or first party benefits must be completely offset) in order to avoid a substantial premium increase. When first party benefits approach the ceiling of $50,000 or $100,000, then the rights of innocent victims to full compensation must be obliterated in order to pay the wrongful drivers their first party benefits within the bounds of a tolerable premium structure.

Any plan which promises to pay unlimited benefits to all victims will probably double the premiums of good drivers, except perhaps in the largest metropolitan areas. The actuarial basis for this result is easy to understand. If present premiums are divided 40 percent to the insurer and 60 percent to innocent claimants, then at the same level of premiums under no-fault, only 60 cents of the premium dollar will still be available to pay *both* the innocent and the guilty drivers, and the single car accident drivers who do not now participate in the system at all. The amount now paid in economic loss and general damages to innocent drivers alone by the tort system is not as great as the economic loss suffered by all drivers, both right and wrong. Paying heavy losses to all wrongful drivers, as well as the economic loss of good drivers, will cost more payment dollars than the liability system now provides. In order to keep premiums at the existing level, it will be necessary to put limits on the economic loss recoveries, and in addition the right of innocent victims to recover general damages must be severely restricted or abolished. This is not fair nor equitable, but it is cheaper than the cost of giving individual justice. It is easier to deal with simple numbers on a punch card than it is to deal with fundamental rights.

The conclusion of the mathematical game leads to Robin Hood in reverse: rob the innocent to pay the guilty.

G. *Subrogation*

Most of the no-fault proposals call for subrogation rights. The insurer who pays the first party benefits is subrogated to the rights of the victim. Although the victim's right to sue in tort may be abolished, the insurers will pretend the old tort law still exists. They will then arbitrate among themselves, and the insurer who pays the innocent victim will recover its payments from the insurer of the wrongdoing driver. The insurer of the driver who violated the rules of the road will thus pay double benefits, paying the first party benefits to its own driver and reimbursing the loss of the other driver's insurer.

In short, the fault concept will remain for private exercise within the insurance industry. It appears that "fault" is good for the insurance companies. It is just too good for members of the general public.

The reason insurers want subrogation is not really to make money or to reduce losses. Any company insuring a broad range of drivers is likely to pay out as much in subrogation claims to other companies as it collects back from other companies, with collection expenses reducing the net to both. The demand for subrogation rights is to preserve some equity in the rating structure.

Because his chance of hitting someone *and* being at fault are relatively small, the good driver now enjoys a lower rate than the high-risk driver. Under no-fault, his chance of hitting someone and being at fault remains small, but his chance of being hit when innocent is a substantial risk which will impose loss upon the first party insurer. Under no-fault, premiums for good drivers have to go up, unless there is some way to transfer their first party losses to the guilty driver.

An alternative to subrogation is the lien, in which the insurer who pays first party benefits has a lien on the tort remedy of its insured. If the insured does not bring a tort action within a year, the lien right may convert to a subrogation right.

The existence of the lien discourages the injured person from trying to duplicate the collection of his medical and wage loss benefits from the tortfeasor, and will by natural process diminish the number of tort claims. At the same time the lien system eliminates duplication of effort and expense. The claimant's attorney in the tort case has to investigate and prepare his case anyway, and there is no reason for the insurer to repeat the work and incur additional cost.

Florida's Act, now in operation, provides for a lien which converts after a year to a subrogation right. It has apparently allowed "good driver" differential rating to continue under the Florida limited type of no-fault.

IV. Operating Costs of Private Insurance Companies

The Report of the Senate Committee on Commerce on Senate bill 945, the National No-Fault Motor Vehicle Insurance Act, states:

> Whereas the present automobile insurance system returns no more than 50 cents in benefits to automobile accident victims for each dollar paid in premiums to insurance companies, the no-fault system would return a far greater percentage of the premium dollar.[2]

Both statements are inaccurate. The present automobile insurance system does pay more than 50 cents in benefits. It pays 63 cents. The no-fault system, if it is operated by the private automobile insurance industry, will not return a greater percentage of the premium dollar.

The report continues:

> Under existing forms of no-fault insurance, percentages of benefit returns range from 70 per cent of each premium dollar to more than 90 per cent of each premium dollar. (Social Security more than 90 cents; private health insurance between 80 and 90 cents; Puerto Rican no-fault plan 90 cents; and present automobile insurance no-fault coverages, 70 cents).[3]

The fact is that the private automobile insurance industry cannot be compared with the other systems specified. Private health insurance, written on an individual policy basis, does not in truth pay "between 80 and 90 cents." It pays *less* than 60 cents and substantially *less* than automobile bodily injury liability insurance.

The social security system is an unsuitable base for comparative cost analysis. This is a compulsory government fund, supported by taxes collected by the employer at its collection and reporting expense. The government does not compete for the business, expends no sums for advertising, promotion, and sales commissions, pays no taxes to itself and transfers much of the record keeping cost to private sectors. How much would social security premiums be if a federal law were enacted abolishing the government fund and compelling every working person to buy a combination disability and future annuity policy from the private sales agent of one of the life and annuity insurance companies? If the answer is based on the historical performance of the life insurance industry, the workingman would be fortunate indeed to get back in benefits more than half his premiums.

The Puerto Rican no-fault plan is, like social security, a government operated health care and disability fund supported by a special

---

[2] S. Rep. No. 92-891, 92d Cong., 2d Sess. 23 (1972).

[3] *Id.*

tax structure which has inexpensive collection costs. The low ratio of cost to benefit under the limited no-fault plan of Puerto Rico would support the argument that the private insurance industry ought to be driven out of the health and disability coverages of any compulsory system. The no-fault proponents are not willing to institute a government fund; however, they have decreed compulsory health and accident insurance and insist the private citizen must purchase it from the private insurance market at the rates fixed by agreement among the industry members, immune from anti-trust regulation.

The statement made in the report about the "private health insurance" systems paying 80 to 90 cents needs definition. Blue Cross and Blue Shield pay out about 93 cents, but these are group plans in which there are no sales commissions, no substantial premium collection expenses, and no investigation or adjustment expenses. The hospital (or doctor) certifies that the patient was present and was treated, and sends the bill to Blue Cross which then pays the hospital directly. Blue Cross would like to write the hospitalization part of no-fault automobile coverage today and is willing to cover not only the subscriber and his family, but also every occupant of his automobile and every pedestrian injured by the subscriber's automobile. There is good reason to believe, based on past performance, that Blue Cross could write this part of the coverage with much lower overhead and expense than the traditional automobile carriers, but Blue Cross is not making much headway against their entrenched interests. "Cash flow" is still the name of the financial game, and the automobile writers are opposed to the diversion of any part of their premium stream.

Group accident and health writers may approach the 80 percent benefit payment percentage claimed in the report, which is misleading in lumping *all* private health insurance in the 80 percent to 90 percent range. There are substantial economies in large group writing. Commissions are relatively small. The employer absorbs the expense of much of the record keeping, policy distribution, billing and paying, and usually helps in the presentation of the claim paperwork. A much better comparison to the automobile health and accident policy of no-fault is the non-group health and accident insurance company. The policyholder in a non-group plan buys his own individual policy from an agent, pays a premium which includes original and renewal commissions, pays continuing premiums on individual billing, and files his own claim which has to be individually verified and documented before payment is made to the policyholder. According to the A.M. Best Company's *Aggregates and Averages,* the most reliable record of insurance company performance, all stock and mutual non-group health and accident insurers combined,

in the decade 1961-1970, collected total premiums of $7.89 billion and paid out in benefits a total of $4.51 billion, or 57 percent of premiums.

The performance of non-group health insurers is quite comparable to that of the private insurers writing workmen's compensation benefit coverages. Workmen's compensation insurance would seem to offer underwriting economy in that the employer pays the premium in a single billing; the employer bears most of the expense of claim filing, investigation, and documentation, and the medical costs are often subject to considerable control through the use of company-selected doctors and clinics. In actual performance, however, the workmen's compensation carriers have shown no better payout record than the automobile liability insurers. In the decade 1961-1970, all the stock company and all the mutual company writers of workmen's compensation insurance, combined, collected net earned premiums of $15.01 billion and paid benefits (incurred losses) of only $8.82 billion, which equals a benefit pay out percentage of only 58.7 percent. There is no reason to expect any better record when these carriers write individual automobile no-fault policies which are inherently more expensive to sell, administer, and investigate.

No-fault automobile insurance might be as efficient as fire insurance, which is typical first party no-fault coverage. The insured home owner declares the value, applies the rate to that value, and pays the premium. The loss must be investigated and the value appraised, but it is a single loss and single payment procedure. It does not include the extra expense built into injury cases of following the victim's continuing loss and continuing treatment, month after month, and paying a variable monthly benefit. Yet, the undeniable fact is that no-fault fire insurance can claim no prize for efficiency. According to Best's *Aggregates and Averages,* in the decade 1961-1970, all stock and all mutual fire insurance companies combined took in net earned premiums of $17.52 billion and paid out $9.71 billion in benefits to the insuring public, or 55.4 percent.

The Report of the Senate Committee on Commerce states that "present auto insurance no-fault coverages" pay out 70 cents of the premium dollar in benefits. The largest category of first-party, no-fault automobile coverage is collision insurance. It is relatively inexpensive to investigate, since it deals with single occurrence, fixed damage to a vehicle for which the owner is entitled to demand single payment of the reasonable repair cost less his deductible. In the year 1970, the stock companies and mutual companies combined paid out $3.75 billion in collision claims out of net earned premiums of $5.94 billion. The payout

percentage was 63 percent. At this level of payout, the underwriting margin was barely over the break-even point, showing an underwriting profit of 0.7 percent for the mutuals and 0.5 percent for the stocks. Both groups claim the right to an underwriting profit of 5 percent in their rate applications, which means that they would regard a payout of only 58.5 percent as representing the maximum which would leave the desired percentage of profit. Aetna Casualty Company, the leading champion of no-fault, achieved this goal in 1970, paying out only 58.1 percent of the collision premiums it collected. It has no intention of paying out the hypothetical 70 percent and would lose money if it did.

How does no-fault collision coverage compare with fault-oriented bodily injury liability coverage in payout percentages? In the calendar year 1970, all stocks and all mutuals reporting to A.M. Best Company showed combined net earned premiums of $5.94 billion and losses incurred (equivalent to benefits paid) of $3.75 billion. This is a payout percentage of 63 percent. The mutuals showed an underwriting profit with a payout of 60.2 percent, while the stocks showed small underwriting loss with a payout of 64.5 percent.

Another form of automobile no-fault insurance is fire, theft, and comprehensive. In this field, the stock companies in 1970 paid 62.8 percent of $1.05 billion in premiums, or $.66 billion. The mutuals paid 66.3 percent of $.48 billion in premiums, or $.32 billion. The combined payout was $.98 billion, or 63 percent of the total premium of $1.53 billion. The mutuals showed an underwriting profit of 1.7 percent, while the stocks had a 1.2 percent underwriting loss.

In the field of property damage liability insurance both the mutuals and the stocks paid back to the public so much of the premium dollar that they suffered substantial underwriting losses. The combined payout was $1.83 billion from premiums totalling $2.6 billion, or 70 percent. At this "undesired" level of payment, the underwriting loss was slightly over 8 percent. The figures show that if the payout to the public had been limited to 61 percent, the business would have been profitable.

The Department of Transportation swallowed the myth that other insurance systems were more "efficient" than tort liability insurance, saying that automobile tort insurance "would appear to possess the highly dubious distinction of having probably the highest cost-benefit ratio of any major compensation systems currently in operation in the country."[4]

---

[4]U.S. DEP'T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 95 (1971) [hereinafter cited as VEHICLE CRASH LOSSES].

One proposition in the DOT study calculates "system expenses" of $1.07 to deliver $1.00 in "net benefits" to victims.[5] "System expenses" are defined as including the costs of providing courts, the cost of administering financial responsibility laws, and the costs of regulating liability insurers. Similar expenses would remain with any form of no-fault plan. "System expenses" also include the insurer's sales expense (including commissions), the insurer's general underwriting expense, and the insurer's expense in investing its "reserves" and "unearned surplus." The insurers certainly intend to continue these expenses under no-fault. Speculative expenses are also included for litigation costs, claimant's attorney's fees, and insurer's attorney's fees and costs. No-fault will not eliminate disputes and lawsuits, as is proven by the litigious history of workmen's compensation laws. "System expense" also includes the insurer's loss adjustment expense, which will be equally necessary in any loss-paying system—even no-fault.

The DOT report also states that "one analysis addressing the cost efficiency of the automobile accident liability system from the consumer's perspective has indicated that 44 cents out of every premium dollar collected is used to compensate accident victims for their losses."[6] The source for this statement is *not* a DOT study. The DOT made no comparison or study of "system expenses" or "cost-benefit ratios" for other insurance systems. The source of the 44 cent benefit figure is footnoted as being a statement prepared for the Joint Committee on Insurance in Massachusetts by Robert E. Keeton.[7] His crusading bias for no-fault is well known, and a thoughtful analyst might have checked the actual performance figures of the automobile insurance industry.

All the DOT needed to do, instead of accepting Keeton's estimate with unskeptical faith, was to republish the official reports of the insurance companies themselves, as compiled in Best's *Aggregates and Averages* and as published annually by the State Insurance Department in New York.

The compilation would have established that for the year 1967, the year in which the other DOT statistics were gathered, the cost-benefit ratios were as follows:

---

[5]*Id.* at 51. *See also id.* at 49, 95.

[6]*Id.* at 51.

[7]R. Keeton, Automobile Insurance Reform Tailored to the Need 1-8, March 11, 1969 (statement prepared for the Joint Comm. on Ins., Mass.).

ALL STOCK COMPANIES

Type of Insurance	Payments to Claimants (Loss Incurred)
Non-Group Health & Accident Insurance	50.2%
Fire Insurance	56.2%
Workmen's Compensation Insurance	63.9%
Automobile Bodily Injury (Fault) Insurance	62.2%
Auto Collision (No-Fault) Insurance	56.8%
Auto Comprehensive (No-Fault) Insurance	52.1%

ALL MUTUAL COMPANIES

Type of Insurance	Benefits Paid (Loss Incurred)
Health & Accident, Non-Group	53.4%
Fire Insurance	51.3%
Workmen's Compensation Insurance	65.0%
Auto Bodily Injury Liability Insurance	63.7%
Auto Collision Insurance	60.1%
Auto Comprehensive Insurance	53.6%

The figures are quite comparable to those for the last decade and to those for calendar year 1970, except that auto physical damage losses and payout percentages have increased between 1967 and 1970 by a few percentage points.

In summary, the automobile insurance industry has consistently paid back in recent years 63 cents or more of the premium dollar to public claimants under the liability system. It pays back more of the premium than other types of typical no-fault first party coverages. It can break even at that level of payout in automobile insurance regardless of whether it is a fault or no-fault type of coverage. The cry that automobile insurance pays "only 44 cents" to claimants is a calculated deception.

Another oft-told myth is that it costs enormous sums to investigate fault. For example, in a television debate on the Southern Educational Television network on October 23, 1972, the regional director for the American Insurance Association said, with a straight face, that "it costs 30 cents of the premium dollar to investigate fault." The statement was a wild exaggeration of the facts. The total cost of investigating fault is just part of the total expense of the insurance company in acquiring the business, paying commissions, investigating and adjusting claims, staffing and maintaining its office, and paying taxes. The total expenses for different lines of insurance companies are reported annually in Best's *Aggregates and Averages* and are compiled also in an annual volume published by the superintendent of insurance of New York, based on

accounting furnished by the insurance companies themselves. The following table, for the year 1970, shows the reported total expense ratios as a percent of premiums.

EXPENSE RATIOS

Type	Fire Insurance	Health & Accident Non-Group	Auto Bodily Injury
All Stocks	39.6%	38.0%	40.3%
All Mutuals	36.9%	41.8%	37.9%
State Farm	39.7%	46.2%	37.0%
Kemper Group	42.9%	47.0%	40.7%
Nationwide	49.9%	42.2%	37.5%
Aetna Casualty	42.3%		39.3%

The actual figures prove that the expense ratio of automobile bodily injury liability insurance is as good as, or better than, the expense ratios for such typical no-fault insurance as fire and individual health and accident.

It does cost a little money to investigate not only the extent of damage, but also the probability of fault. In automobile property damage liability, the investigation and adjustment concerns not only the extent of damage and the cost of replacement or repair, but also the question of whether the insured driver was at fault in causing the damage. The investigation of a collision damage claim, which is payable regardless of fault, is concerned with the cost of repair under circumstances where liability is fixed. The statistics show that fault investigation costs only a few pennies of the premium dollar. The 1970 figures for loss adjustment expenses, under standard insurance company accounting and reporting practice, are as follows:

	Collision, Loss Adjustment Expense	Property Damage Adjustment Expense
All Stock Companies	8.1%	11.2%
All Mutual Companies	10.3%	12.4%

It necessarily costs more to investigate injury to people than it does to investigate damage to automobiles. Instead of one repair bill, there may be many. Instead of a bluebook price, there will be variable doctor bills. Instead of a fixed mechanic's rate, there will be variable wage loss. Where disability continues for several weeks, the medical issue will have to be investigated.

Did the accident cause the injury? If so, how extensive was the injury? Is it a fresh injury, or a recurrence of a pre-existing injury or disease? Is the injury as disabling as the claimant says? How rapid is

the recovery, or how rapid should it normally be? Is the treatment obtained "reasonably necessary," or is it luxuriously extravagant? How much permanent disability remains, and how much does it interfere with earning capacity?

All of these issues consume time and expense in investigation. They often result in medical examinations, at insurance company expense, by defense medical experts. This kind of investigation will still be necessary under no-fault. There is no way in which legislation can standardize injury, standardize physiologic response to trauma, or standardize the rate and extent of healing. The difference in cost between the investigation of property damage liability claims and the cost of investigating bodily injury claims measures the added cost of investigating and adjusting the value of human injury. The additional cost is small, but it has nothing to do with the fault system and will remain a cost element under any no-fault system which pays medical expense and wage loss.

There is considerable variance from company to company on loss adjustment expense for bodily injury liability. For Aetna Casualty, a leader in the American Insurance Association, the 1970 loss adjustment expense for bodily injury was 11.1 percent of the earned premium, compared to 10.2 percent for property damage. For Nationwide, it was 12.7 percent for bodily injury against 10 percent for property damage. State Farm had a very high loss adjustment expense for bodily injury coverage in 1970, amounting to 19.4 percent of the premium dollar, compared to 13.7 percent for property damage. The Kemper Group spent 13.9 percent, compared to 11.1 percent for property damage.

The combined total for all stock companies in 1970 was 13.3 percent loss adjustment expense for bodily injury coverage, against 11.2 percent for property damage liability insurance and 8.1 percent for collision insurance. The similar loss adjustment expense totals for all mutual companies in 1970 were 16.6 percent of the premium for bodily injury liability coverage, against 12.4 percent for property damage and 10.3 percent for collision.

The higher percentage for the mutuals reflects the fact that its sales agents are generally paid a lower commission and do not perform as many investigating services as the agents for the stock companies, who are paid higher commissions. The result is that the mutuals show a higher loss adjustment expense, but a lower over-all expense.

A fair picture of adjustment costs and over-all expense may be obtained by averaging the costs of the stocks and the mutuals for 1970 in the three major types of automobile coverage:

Bodily Injury, Total Expense	39.1%
Loss Adjustment Expense	14.9%
Property Damage, Total Expense	36.5%
Loss Adjustment Expense	11.8%
Collision Damage, Total Expense	34.7%
Loss Adjustment Expense	9.2%

How much does it cost to investigate fault? From these figures a fair conclusion is that it costs only 2 cents to 2.5 cents of the premium dollar to investigate and determine the issue of which driver was at fault. The rest of the cost is expended in determining the nature and extent of the loss in either physical damage or personal injury.

This cost, however, will remain in a no-fault system unless the system gives a flat rate for weekly wage loss and a flat rate for medical and hospital expense—which no one wants or advocates. The total cost is a small percentage of the premium.

Anyone who talks of cutting rates by 15 percent, or 25 percent, or 50 percent by eliminating the fault criteria is uninformed, unthinking, or deliberately trying to hoodwink the public. The only way no-fault can reduce premiums is by cheating the consumer out of his natural rights and his present benefits. If *all benefits* were totally eliminated, and the insurance company paid out nothing, premiums would only be reduced by 60 percent—assuming we still paid the cost of running the private insurance industry.

V. The Role and the Cost of the Private Attorney

It has become fashionable for no-fault proponents to castigate the private lawyer as though he were responsible for all the poor practices of the insurance industry: high cost, arbitrary cancellations and non-renewals, discriminatory rating and underwriting, red-lining of insurance-not-for-sale areas, and delays in the payment of claims. The most irresponsible statements deal with lawyer's fees of the claimant in which the estimates given by propagandists in the media have risen from a billion to a billion and a half to two billion dollars a year and even to "half the premium dollar." It would be convenient if the public could halve its premiums, or double its recovery, by abolishing all the lawyers presently hired by some of the claimants, but that is a wistful dream. The present insurance system makes no contractual provision for lawyers. Where is it written in the policy that the injured claimant must hire an attorney and pay a fee? Where is it written that if the claimant does hire an attorney the insurer will pay extra amounts out of its loss re-

serves to give the lawyer his pay? In every instruction to every jury in every accident case, the judge admonishes the jurors to return a verdict for compensation to the victim which is fair and just for his injury and loss, but for no amount in excess of fair compensation. The jury is not permitted to award an attorney's fee.

If the injured claimant hires a lawyer, he alone pays the lawyer for the service rendered. It might be supposed that this payment reduces the net amount the injured man receives and keeps. That would be true if the insurance adjuster would pay him the same amount without a lawyer that the adjuster is willing to pay when he hires a lawyer to represent his interests. It seldom works out that way. In most cases the victim who has a lawyer receives more than he would without one, and the increased amount more than covers the lawyer's fee.

It must be common knowledge to everyone who has bargained with an insurance adjuster that, with the possible exception of very small claims, the insurer tries to settle at the lowest possible cost. To an insurance man the true value of any claim is the cheapest price at which the claimant can be beaten down to a settlement. The claimant is an adversary, whether in third party liability coverage or first party collision coverage. There are more complaints from the public about unfair dealing in first party collision insurance claims than there are about third party claims. Indeed, the insurer has considerable power to resist the imposition of a first party claim (such as collision damage under no-fault collision coverage) by threats of cancellation, non-renewal, surcharges under merit-rating plans, or withdrawal of safe-driver discounts or refunds. This kind of pressure to discourage even the filing of legitimate small claims will remain under no-fault systems. It may well account for the surprising finding of Opinion Research, in its poll of Massachusetts accident victims under that state's no-fault system, which showed that 34 percent of potential claimants with a valid right to recover had declined to file any claim at all.

The injured victim who presses a third party claim against the insurer of the at-fault driver has little fear that his claim for compensation will reflect on his own coverage and rating. He is likely to find support and cooperation from his own carrier if it is pursuing a subrogation claim against the third party carrier to reimburse its collision coverage loss.

The third party carrier is, nevertheless, a powerful opponent. The adjuster is trained, experienced, and skilled in reducing claims. He knows how to threaten the loss of all recovery on a defense of contributory negligence. He knows how to suggest that all offers will be with-

drawn if the claimant hires a lawyer, and how to instill fear that the case will be fought for years, and that the lawyers fees and costs will be so great that little will remain for the claimant. Against such pressure, what bargaining power does the injured man have? There is only one key he can use to unlock the loss reserve: *the threat that if he is not offered a fair and acceptable amount he will indeed hire a lawyer and take his chances on litigation.* The mere ability to hire a lawyer enables the claimant, more often than not, to bargain out a settlement without ever in fact retaining a lawyer. He will consult an attorney only if he cannot reach agreement on what he thinks is fair. The attorney may tell him to take the offered settlement or may advise him that his injury is worth more. It the lawyer is retained, the lawyer's only instrument of power is the threat of suit. If no accord is reached and suit is filed, the final threat is trial and verdict. Even though DOT statistics establish that only one injured victim out of 300 ever pursues his claim to the point of actual verdict, it is the inherent ability to go to trial and the values established by trials which cause the vast majority of claims to be settled without trial and most claims to be settled without lawyers.

Support for this statement is found in the DOT study *Automobile Accident Litigation,* which made a statistical determination that in 1968, 220,000 lawsuits were filed with respect to automobile accident injuries.[8] According to widely accepted estimates, in that year there were a total of about 4.4 million injuries and deaths.[9] (The Insurance Information Institute postulates more than 5 million). This means that only 5 percent of all victims ever reach the point of filing a lawsuit.

The same DOT study found that only 7 percent of all cases filed were tried to verdict. The rest were all settled or dismissed before submission to a jury. Seven percent of verdicts times 5 percent of suits filed means that 0.35 percent of all victims pursue an injury claim to verdict—approximately 1 out of 300.

What does this process cost the injured victim? Obviously it does not cost him anything if he settles directly without ever hiring or paying a lawyer. All "average" statistics are inherently false. The claimant does not pay an "average" amount of his recovery. He either pays a fee or he doesn't. If he does hire a lawyer on a contingency and loses, he pays nothing. If he hires a lawyer on a contingency fee basis and wins, he usually (but not always) receives an amount greater than the final offer *without* a lawyer, so that his net recovery is increased. This is

---

[8]U.S. DEP'T OF TRANSP., AUTOMOBILE ACCIDENT LITIGATION 7 (1970).

[9]*Id.*

particularly true in serious injury cases with heavy economic loss. The DOT study, *Economic Consequences of Automobile Injuries,* reported that in cases of economic loss exceeding $25,000, claimants with counsel averaged a tort recovery of $25,494 and claimants without counsel averaged only $3,821.[10] The level of average recoveries with and without counsel do not prove, by themselves, the value of counsel. The real question is what the claimant who hired a lawyer could have recovered on his own without the help of a lawyer. It must be true, as a broad generality, that the people who hire independent counsel are the people who need them. It must also be true that lawyers generally do represent their clients effectively, or else the stock companies would not be so anxious to abolish the role of the personal lawyer for the private claimant. It would be intolerable to place the ordinary citizen in a position where he had to rely on a sense of "fair play" by the insurance company claims adjuster in order to receive his full and just compensation.

It should be noted that there is no *public* demand to destroy lawyers. The public attitudes survey by the Department of Transportation proved that 80 percent of all persons with claims against third persons for personal injury damages were *completely* satisfied. They were satisfied whether they hired a lawyer or not, but the ability to get one certainly contributed to the satisfactory result.[11]

How many injured victims who make a claim under the present system find it worthwhile to retain their own legal counsel? A minority do, a majority do not. The percentage varies from state to state, so that national average figures are inconclusive. Accident victims in the Northeastern States are either exceptionally litigious or else insurance adjusters there are exceptionally obdurate. The DOT study *Automobile Personal Injury Claims* was based on a 10 day sample of closed claim files of the 16 largest auto insurance carriers in 19 states.[12] One of the states was Massachusetts, which showed the extraordinary percentage of attorney representation of 78.8 percent of all claimants. The four Northeastern States in the sample, Massachusetts, New York, New Jersey, and Connecticut, averaged 63.3 percent of claimants with attorney representation. In sharp contrast were the broad sampling of 15 other states in the remainder of the continental United States. California, Colorado, Florida, Georgia, Illinois, Indiana, Michigan, Minnesota, Mississippi, North Carolina, Ohio, Pennsylvania, Texas, Washington, and Wisconsin showed (averaging these 15 states) that only 32.4 percent of all paid

---

[10] 1 U.S. DEP'T OF TRANSP., ECONOMIC CONSEQUENCE OF AUTOMOBILE ACCIDENT INJURIES 322 (1970) [hereinafter cited as ECONOMIC CONSEQUENCES].

[11] U.S. DEP'T OF TRANSP., PUBLIC ATTITUDES TOWARD INSURANCE 122 (1970).

[12] 1 U.S. DEP'T OF TRANSP., AUTOMOBILE PERSONAL INJURY CLAIMS 4-5 (1970).

bodily injury claimants were represented by an attorney.[13] In other words, in most of the United States, two claimants out of every three do not pay any part of their recovery in attorney's fees. In the absence of contrary evidence, it should be assumed that the one out of three who do hire and pay an attorney find it reasonably necessary to do so. This is indicated in the statements in the DOT study: "Perhaps a better explanation is that a claimant who seeks an attorney greatly improves his chance of receiving some payment."[14]

How much do attorneys receive in payment for all their services to all the injured victims who need them? Nobody really knows. There is no valid sampling or study. The DOT estimates are admittedly based on limited and skewed sampling. In the *Automobile Accident Litigation* study, questionnaires were sent out in "selected" cases, but only one out of three were answered.[15] Only 396 replies in total were analyzed to predict average attorney's fees and litigation costs for the entire United States. The study concedes that the samples were weighted or skewed toward cases actually tried to verdict. A commonplace form of retainer agreement is 25 percent on settlement without suit, 33⅓ percent after filing suit, and 40 percent or more after trial. A sample reflecting an inordinate number of cases tried to verdict will show fees much higher than average, just as a sampling of claims where suit was filed (the only kind of claim investigated in the *Automobile Accident Litigation* study) necessarily excludes the lower fees charged for settlement without suit. The average fee in the inaccurate 396 case sample was 35.5 percent. The DOT statisticians then applied this high fee average to every claim settled in the *Personal Injury Claim* study if the claimant had a lawyer. The study in turn weighted the number of claimants retaining counsel by including four Northeastern States with a 63.3 percent lawyer retention average, which inflated the average of the remaining states from 32.4 percent to a supposed national average of 46.5 percent[16] for lawyer retention. Using the high average fee and the high average retention rate and applying it to all benefits paid to claimants with attorneys, the *Personal Injury Claims* study announced (with statistical tongue in cheek) that the total fees in the United States for all claimants' attorneys were $794 million.[17] This figure is easily rounded off to a billion dollars, which is easy to expand to a billion and a half dollars or two billion dollars if the speaker is a little careless with the truth.

---

[13] *Id.* at 78.

[14] *Id.* at 47.

[15] AUTOMOBILE ACCIDENT LITIGATION, *supra* note 8, at 4.

[16] 1 AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 12, at 78.

[17] *Id.* at 80.

The application of the 35.5 percent "average fee" to the amount of money paid to lawyer-represented claimants and comparison of that to all money paid all claimants whether represented or not, leads to the inflated estimate that the average claimant pays an average fee of 27.3 percent on all payments received.[18] On the reasonable assumption that benefits paid are equivalent to 60 percent of the premium dollar, then all claimants' lawyers would receive 16.4 percent of the bodily injury premium dollar, provided the initial estimate of 35.5 percent is correct, which it clearly is not.

Traditionally, lawyers who represent injured clients do not charge the client for helping him settle his collision and medical claims with his own carrier, so that the highest possible estimate of the attorney's share of the entire automobile insurance premium dollar for all coverages would be slightly less than 7 percent. This is the number used by Ford Motor Company in its nationwide series of advertising which divided the premium dollar, as Ford guessed it, into 36 cents for the insurance company itself, 30 cents for automobile repairs, 6 cents for other automobile losses, 21 cents for personal injury, and 7 cents for the claimant's lawyer. Ford, graciously, did not complain about the fees for legal representation, but suggested that insurance company expense was extraordinary. It is interesting to speculate that if all attorney's fees were cut in half the public could save 3½ cents of its premium dollar; but if insurance company expense were cut in half, the public would save 18 cents of its premium dollar. If the insurance industry cut its expenses to the level of social security, Blue Cross, or the Puerto Rican government fund, the public would save 30 cents of its premium dollar and could still retain counsel when needed.

The next oversimplification is that no attorneys will ever be hired by a no-fault claimant. One has only to observe the litigation in workmen's compensation cases to realize that a right to fixed benefits does not prevent disagreement and litigation over the issue of whether the particular claimant is entitled to receive those benefits. The insurer may insist that the injured workman should grit his teeth and bear a little pain so that he can return to work and avoid wage loss. The workman may insist that he will not return to work if it causes any pain and will remain home until completely cured. No one can predict what litigation costs will be under no-fault, but everyone knows that litigation will continue.

Those who decry the "stake" of the claimant's lawyer in the final distribution of the premium dollar should, in all fairness, point out

---

[18] *Id.* at 73.

that the insurance industry tucks away annually nearly as much money in the investment profits it makes with policyholders' premiums as all the claimants' lawyers make in automobile cases. Insurance agents take more in sales commissions than lawyers do in fees. Doctors take more of the premium dollar than lawyers. Automobile repairmen take far more of the insurance dollar than lawyers. This is not to suggest that any one of these professions or trades do not earn their compensation. They undoubtedly do. Lawyers earn their share as well, and their presence benefits not only the one out of three claimants who hires a lawyer; but in a very real sense, their presence gives protection and benefit to the two out of three claimants who settle without a lawyer.

VI. The Overcompensated/Undercompensated/Wholly Compensated Victim

Some injured people recover from the tort system more than their economic loss; some recover less than their economic loss; and some recover nothing. This fact should cause neither surprise nor dismay. Some people who sustain injury are in the right, some are in the wrong, and some are in a doubtful class where contributory negligence might be a defense, but a compromise settlement seems prudent to both sides.

Throughout the free world, all the major powers have evolved a system designed to give some medical payment and wage loss benefits to every injured person, whether right or wrong. At the same time, the innocent victim is intended to be made whole and is compensated for the entire loss sustained, including the very real loss of enjoyment of the pleasures of life. Society has an interest in binding up the wounds of all of its members and restoring them, if possible, to useful and productive occupations. Society has a strong interest in achieving justice for each of its individual members, which requires full compensation to those who have obeyed society's rules and sustain injury at the hands of those who violate the rules. The victim of injury whose wrongful conduct has inflicted loss on himself and others has no claim on society for full and complete compensation, even though he may receive varying percentages of medical and wage continuation benefits. This is the system in Sweden, Norway, West Germany, France, England, Italy, Japan, and in the Canadian provinces of Manitoba, Saskatchewan, Ontario, Quebec and Nova Scotia.[19] In general, medical benefits and wage

---

[19] *See* A. Conard, J. Morgan, R. Pratt, C. Voltz & R. Bombaugh, Automobile Accidents Costs and Payments 413-84 (1964) [hereinafter cited as Automobile Accidents].

continuation funds come from tax-supported government social security programs, which make no distinction between automobile-related injuries and other injuries. All these countries have tort systems, generally backed by private insurance, which provide for *full* compensation to the innocent.

The United States followed the same philosophy until the present no-fault debate, believing in full compensation for those in the right through a tort system calling for individual responsibility and offering medical payment and wage continuation benefits through multiple systems of governmental social security systems, work contract fringe benefit systems, and private insurance systems.

In any country which attempts to individualize its system of justice, the amount of compensation received by each victim will vary over wide ranges if it is measured solely as a percentage of economic loss. For example, assume a stop sign crashing collision occurs in which four people receive an identical injury consisting of a simple fracture of the tibia (the shin bone of the lower leg). Each receives the standard treatment, consisting of closed reduction and the application of a full plaster cast from toes to upper thigh. Each one is discharged from the hospital after an overnight stay and goes home to a regimen of bed rest, wheelchair, and then crutch ambulation without weight bearing for 3 months. For 3 more months after the cast is removed, each one undertakes exercise and therapy to free up the stiffened ankle and knee joints and gradually increases weight bearing, range of motion, and mobility. Six months after the injury, each one has achieved substantially complete recovery—but at the cost of considerable early pain, sleepless nights, boring days, discomfort and itching under the cast. Each one has lost most of the pleasure of life for half a year.

Victim *A* is a housewife whose small community hospital charged $50 for the overnight stay and whose doctor charged her $150 for bone-setting, cast application and removal, and instructions in therapy. The family all joined in to do the housework and cooking, and her wheelchair was loaned to her by an aunt. The insurance adjuster offered her $2,000 as his company's estimate of fair compensation for her 6 months of temporary disability which she accepted. With $200 expense and $2,000 in total payment, she received 10 times her economic loss or nine times her "specials" (the $200) for her "pain and suffering."

Victim *B* was also a housewife, but was taken by ambulance to her nearby large city hospital and charged $100 for her "first day" admission plus $20 for the use of the cast room. Her doctor, applying the medical ethic of charging a higher rate to those of wealth, collected a $300 fee for treatment, multiple check-up, x-rays, and supervision of physio-

therapy. Her husband hired a day time practical nurse to do some house work and cooking, in addition to assisting his wife in bathing and toileting. The charge was $20 a day for 5 days a week for 12 weeks, or $1,200. Wheelchair rental and crutch rental totaled $80. Her physiotherapy consisted of ten sessions of whirlpool, passive stretching, and exercise instruction at a specialized physiotherapy center, at $10 a session. The "specials" thus amounted to $1,800. She too agreed on a settlement of $2,000 for her 6 months of disability, plus $1,800 for the total expenses. Thus she received twice her economic loss, or one times her "specials" for "pain and suffering."

Victim *C* was a male employed at a desk job, *e.g.*, an architectural designer and draftsman making $1,000 a month. He went back to work, on crutches, in a specially constructed "walking cast" after two months. His total bills for hospital, doctor, and physiotherapy were $400. He too agreed to accept $2,000 for his disability, pain, and inability to pursue his usual sports and hobbies for several months. The settlement of $2,000 plus the economic loss of $2,400 totalled $4,400. His payment for "pain and suffering" was only 60 percent of his economic loss, and his total payment was only 1¾ times his "specials."

Victim *D* was the driver of the car who crashed the stop sign. He made no claim against the driver on the main highway. He had medical insurance on his car, which repaid his total medical bills of $400. He lost 4 months work because his work at a die shop required him to stand all day and move around the different machines. Even with a reinforced boot, he could not take the physical strain sooner. His employer had a wage continuation plan which paid 80 percent of his wage loss; but at $4 an hour for 40 hours a week for 16 weeks, he lost $2,560 and recovered only $2,048. The statisticians of no-fault would say that he lost $2,560 in wages and $400 in medical and recovered "nothing" from the tort system.

The proponents of no-fault are not likely to view the driver and the two passengers in the car with the right-of-way, nor the driver who crashed the stop sign, as individual people with different rights. Instead the victims become magnetic dots on plastic tape which unreels through the computers which then calculate that some victims receive 10 times their economic loss from the tort system, and some receive lesser multiples of five times, three times, or 9/10 times the "special" damages, and some receive nothing at all.

One of the first studies to make a large scale statistical analysis of the relationship between economic loss dollars and tort recovery dollars observed that where economic loss was small, the tort recovery was a

higher multiple of the pocketbook loss than it was in cases where the pocketbook loss was high.[20]

In the DOT closed claim survey, *Automobile Personal Injury Claims,* the bodily injury liability and uninsured motorist claimant files of 16 insurance companies in 19 states, closed within a given period in 1969, were subjected to computer analysis. Many tables were published, showing the economic loss to date of settlement in various increments and the average bodily injury compensatory payments as a multiple of the loss with and without attorney, with and without suit, with and without permanent injury or disfigurement, with subclassifications by type of accident, urban or rural residence, and the occupation and age of the claimant.[21] As would be expected, where the economic loss was between $1 and $25, the multiple of payment was larger (a factor of 7.5 for all claims) than in cases where the economic loss was between $501 and $750 (a factor of 3.0 for all claims).[22]

The statement of average multiples tends to be deceptive. Where the multiple is high, the actual dollar amount may be low. For example, the median payment in the $1-$25 economic loss class would be a loss of $12.50, and a total payment 7½ times that would be only $93.75. This would translate to a payment of $81.25 for general damages for pain, shock, inconvenience and temporary disability, and pocketbook loss of $12.50. The median payment in the $501-$750 economic class would be $625 for the pocketbook loss plus $1,250 for general damages, or a total of $1,875. If the economic loss were $5,000, then the multiple would drop to 1.8 (for losses over $2,000) which would give a payment of $4,000 for general damages plus repayment of out-of-pocket losses. Note that the respective dollar amounts are greater when the economic loss is greater, even though the multiple is much lower.

The amount of money paid to small loss claimants is not very great, despite the high multiple. The median payment to all claimants is less than $500. Fifty-six percent of all paid claimants received a payment somewhere between $1 and $500.[23] Although this range covers more than half the number of payments, it uses only 7.8 percent of all payment dollars. If all the "small" cases, the 56 percent where payment is less than $501, were denied any payment beyond strict economic loss, the dollar saving would not be enough to cause significant premium reduction.

---

[20] AUTOMOBILE ACCIDENTS, *supra* note 19.

[21] 1 & 2 AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 12.

[22] *Id.* at 114.

[23] 1 AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 12, at 49.

The mere fact that a victim with a small economic loss is likely to receive a higher multiple of that loss in settlement than does the victim with a heavier pocketbook loss by no means proves that one is "overcompensated" and the other is "undercompensated." It is more likely that each is compensated reasonably with respect to the factors of liability, the amount of suffering, and the extent of disability. Each receives the amount an insurance company adjuster or claims committee concludes is reasonable, or in the rare case that goes to judgment, the amount an impartial jury determines to be reasonable compensation. The authors of *Automobile Accident Costs and Payments* warned against the use of any of their tables of multiples to prove "overcompensation" and stated: "*Ratios of more than 150 percent* may be conveniently thought of as signifying cases of *full economic* compensation plus *substantial psychic* compensation. . . . It is hardly necessary to say that none of the ratios, however high, can be regarded as signifying 'overcompensation' in the absence of a means of measuring psychic loss. Not only does the law command compensation for psychic loss, but questions asked in the course of this survey indicated that a large preponderance of people with injury experience believe in it."[24]

The propagandists for no-fault have popularized the concept that the higher multiple for the smaller claim payments constitutes "overcompensation," while recovery of anything less than exact economic loss is "undercompensation." Both "overcompensation" and "undercompensation" are said to be "inequitable" by such proponents as Professors O'Connell, Keeton, and Davies. Senator Philip Hart, co-author of Senate bill 945, has called the tort compensation system "inhumane" in his latest article. The adjectives are easily repeated, but it is really "inhumane" to postulate that the driver on the right side of the road or his insurance company should not be required to compensate the driver on the wrong side of the road who causes a head-on collision? Is it "inhumane" to suggest that there really is no formula relationship between the suffering and the disability caused by the injury, the medical cost, and wage loss occasioned by its treatment?

Most of humanity believes there is a difference between right and wrong, and most of humanity wants individualized justice that attempts to measure the actual hurt to the individual person.

The ultimate absurdity of computerized economic loss data is the formula plan for no-fault compensation. The formula recognizes that the loss of enjoyment of life is a true loss, which ought to be paid, but decrees that disability and suffering is a function of medical bills.

---

[24]AUTOMOBILE ACCIDENTS, *supra* note 19, at 196-97.

If the bills total $400, the "pain" is worth 50 percent, or $200. If the bills total over $500, the "pain" is worth 50 percent of the first $500 worth of bills and 100 percent of the bills over $500. For example, two victims receive crush injuries to the lower leg when caught between bumpers. In the case of victim *A* the surgeon decides repair is hopeless and performs immediate amputation. The total medical and hospital cost might well be only $1,000. Victim *A* would receive $750 under the formula plan (also known as the Cotter plan). Victim *B,* on the other hand, with less soft tissue and circulatory damage, might save his leg. After extensive hospital care, with bone graft, skin graft, traction, antibiotics, and rehabilitative therapy, he might come out of the accident with a very useful and normal appearing leg at a medical and hospital cost of $8,000. The formula would award him $7,750 for pain and suffering, because a computer doesn't know that a leg lost is more disabling and misery-producing than a leg saved. According to the formula, people suffer less in cheap hospitals with cheap treatment by low fee doctors than they do in expensive hospitals with expensive treatment by high cost specialists.

The mathematical tables, comparing economic loss and tort compensation, are utilized not only in formula plans, but also to justify various threshold plans. The argument goes that claims involving small economic losses are "nuisance" claims, wherein people may exaggerate their symptoms and gain extravagant overcompensation. The "nuisance" case, with only a $5 doctor bill, might get a $50 settlement. "We have to stop paying 10 times the economic loss" then translates to "we have to stop paying 10 times the *real* loss" which translates to "we have to get rid of the nuisance case."

Once agreement is reached that "society has to get rid of nuisance cases," which sounds logical, the argument proceeds: "If we stop overcompensating the small case then more funds can be used to compensate the seriously injured victim." This translates to the next stage of verbal legerdemain: "Of course, we would wish to retain the right of the seriously injured victim to sue for his non-economic loss." The next step is to define "seriously injured."

Senate bill 945, the national no-fault act in the version called Committee Print 2, the Stevenson bill for the District of Columbia, and the Denenberg bill in Pennsylvania all defined "seriously injured" as meaning at least a 70 percent permanent partial disability. What does that mean? Using standard disability evaluation tables, one leg off at the hip, or one arm off at the shoulder, or total fusion of the entire spine from the top of the neck to the tailbone, or traumatic epilepsy from brain injury producing convulsive seizures only once a week, or blindness

in one eye, or total deafness constitutes *less* than 70 percent permanent partial disability. Under the philosophy of the named no-fault bills, a case is a "nuisance" case if it involves only one leg off or two legs off below the knee, but it is a serious injury case if one of the two legs off is amputated above the knee. The humanity of that distinction is hard to follow.

In the proposed Uniform Motor Vehicle Accident Reparations Act, the "nuisance case" is abolished by a definition retaining the tort remedy for non-economic losses, if the temporary disability is so severe that for no part of any day for more than 6 months can the victim perform any part of the duties of his occupation. The definition is far more restrictive than the definition of permanental total disability in the Social Security Act. One business phone call on the 182nd post-accident day would obliterate tort recovery.

The model bill of the American Insurance Association, the model bill proposed by Nationwide Insurance Company, and the federal version of Committee Print 3 of Senate bill 945 propose total abolition of the right to a tort recovery in every case. They abolish the nuisance case, the small, the moderate, and the serious case. They mandate abolition of all "over-compensation" by decreeing uniform undercompensation for all victims, right or wrong.

VII. The Undercompensated Seriously Injured Victim

One of the strident arguments for the "pure" no-fault plans is that the present system fails to compensate adequately the seriously injured victim. Unlike many of the other arguments of the proponents, there is some truth to this one—about half. The argument is based upon the statistical projections of aggregate losses, and aggregate compensation, in the Department of Transportation study titled *Economic Consequences of Automobile Accident Injuries.* This study took a sample of 1,376 accident victims and extrapolated it to a theoretical universe of 513,000 fatality and "serious injury" (as defined) cases per year. An injury was classified as serious if the victim had 2 weeks of hospitalization, or had medical costs excluding hospital costs of $500, or had 3 weeks of missed work if employed, or if not gainfully employed, sustained 6 weeks of missed normal activity. The authors stated that the criteria for serious injury were "arbitrary at best, and one can anticipate some classification error."[25]

Future losses in the study were based on the respondent's answers to a questionnaire, giving an unverified estimate of future medical ex-

[25] 1 Economic Consequences, *supra* note 10, at 17.

pense; and future wage losses were derived from the respondent's estimate of the extent and length of his disability. The authors warned against the "speculative" nature of the projections of future losses, cautioned against memory error, response error, sampling error, and classification error, all of which result in a study which provided "more precise estimates of averages and ratios than of aggregates."[26] However, unreliable as the data may be, it is the only study of future losses available, and the Department of Transportation has publicized widely the doubtful estimates of aggregate victims and aggregate losses.

The projections of the sample conclude that 513,098 persons (out of an estimated class of 4.2 million injured persons per year) should be classified as serious injury or fatality cases. The fatal-or-serious injury class is estimated to sustain an aggregate economic loss of the type called "personal and family loss," excluding property loss and discounting future losses, in the annual amount of $5,126,595,000. This means an average loss per victim of $9,991.[27] The whole class is said to recover, from the tort system, a net amount of only 16 percent of its total loss, or approximately $820 million. The tort system is only one of many systems which compensate injury victims, and the whole class of fatal-or-serious injury cases is said to recover 33 percent of its total losses from other systems, or approximately $1.7 billion. Total recovery of the whole class from all systems is thus 49 percent of the total economic loss suffered by the class.

The proponents of "pure" no-fault argue, with typical inverted logic, that inasmuch as the seriously injured victim recovers only 16 percent of his loss from the tort system, and this is inadequate and unfair, then the system should be changed so that both seriously and non-seriously injured victims recover zero percent of their losses from the tort system, substituting total deprivation of tort recovery for the partial payment it now provides.

A closer study of the sample data and basic tables will demonstrate the "average recovery" figure of 16 percent from tort and 33 percent from other systems is grossly skewed by a small percentage of catastrophic injury cases and huge loss fatality cases. The same tables in *Economic Consequences of Automobile Accident Injuries,* which give the figures quoted above, show that the great bulk of seriously injured victims, as a group, recover quite fully from the combination of tort and other systems.[28]

---

[26] *Id.* at 18.
[27] *Id.* at 277.
[28] *Id.* at 273-74, 277-78.

The subclass of fatally or seriously injured persons who sustain economic loss between $1 and $9,999 is said to number 436,439 persons, or 85.1 percent of the entire class. This subclass is said to have an aggregate loss of $1,162,387,424, which averages at $2,664 each.[29] The class recovers from the tort system, "net" as speculated, $523,649,130 and recovers from other systems $729,095,871. The total recovery of this class of 85.1 percent of all fatal-or-serious injury cases is thus $1.25 billion, or 108 percent of the loss of $1.162 billion.[30]

All the systems begin to break down when the economic loss exceeds $10,000. The subclass of fatally or seriously injured persons sustaining economic loss between $10,000 and $24,999 is said to number 31,417 persons, or 6.1 percent of the whole class. The aggregate loss of this small group is said to be $517,092,043, or an average of $16,459 each.[31] Net tort recovery is estimated at 24 percent or $124 million; and recovery from other systems is estimated at 33 percent, or $170 million, which yields a total recovery of 57 percent of the losses of this subclass.[32]

The cumulative totals of these two subclasses would show 467,856 persons seriously or fatally injured, sustaining an average loss of $3,589 and an aggregate loss of $1.679 billion, with a total net tort recovery of $647.6 million and a total other recovery of $899 million, which together repay 92 percent of the total loss. Stated another way: fatally and seriously injured victims recover, as an entire class, only 16 percent of their losses from tort and 33 percent of their losses from other sources. Within this class, the group with losses under $25,000 constitutes 91.2 percent and recovers 92 percent of the entire present and future economic loss from the multiple compensation systems presently in use.[33]

All systems show deficiencies when the losses exceed $25,000. The subclass of catastrophe cases is said to number 45,153 persons annually, or 8.8 percent of the whole class of fatal-or-serious injury cases.[34] Note, however, that the total number of *all* injury victims annually is variously estimated between 4 million and 5.5 million. The number adopted by the Department of Transportation in its final report, *Motor Vehicle Crash Losses and Their Compensation in the United States,* was 4.2 million.[35] The small number of catastrophe cases, estimated at 8.8 percent of the class of seriously injured or fatality victims,[36] is only 1.07

---

[29] *Id.* at 277.
[30] *Id.* at 278.
[31] *Id.* at 277.
[32] *Id.* at 278.
[33] *Id.*
[34] *Id.* at 277.
[35] VEHICLE CRASH LOSSES, *supra* note 4, at 2.
[36] 1 ECONOMIC CONSEQUENCES, *supra* note 10, at 277.

percent of the entire group of all accident victims. The small subclass of fatally or seriously injured persons who recover inadequately under the tort systems also recover inadequately from all the other systems such as life insurance, health and accident insurance, social security, medical pay auto insurance, sick leave and wage continuation plans.

This small group of 45,153 persons sustains present and future economic loss in the average amount of $76,341, which totals $3.447 billion annually.[37] The subclass recovers an average of $3,742 from tort and $17,889 from other systems for an average aggregate of $21,641.[38] Although this dollar amount is a substantial sum, it is said to be only 28 percent of the huge loss, composed of a 5 percent recovery from the tort system and a 23 percent recovery from other systems.[39]

The proponents of "pure" no-fault insist that 100 percent of this loss must be paid from a compulsory health-and-accident type automobile insurance. The cost to the customer for this level of payment is easy to calculate. If it is true that the total loss of this class constituting 1 percent of all victims aggregates $3.45 billion, then the loss (exclusive of property damage) must be $3.1 billion. If only $169 million is now being paid from the tort premium, then the additional benefits which would have to be paid from the automobile no-fault bodily injury premium necessarily total nearly $3 billion. Inasmuch as the payout of the private insurance industry based on past performance cannot reasonably be expected to exceed 60 percent of the premium, it would take $5 billion in net annual premium intake just to pay the losses of these 45,153 catastrophic cases.

What would this mean in financial burden to the average driver? The total bodily injury liability premiums collected by all the insurance companies in 1967, according to A.M. Best Company's *Aggregates and Averages* amounted to $4.9 billion. This figure, however, includes both basic and excess limit premiums. Senator Philip Hart estimates that 35 percent of this premium was for excess limits.[40] This means that the cost of all state minimum limit policies was only $3.19 billion. It is possible that an additional 10 percent of premium payers could be acquired by an enforced compulsory system, which would generate a total of $3.5 billion in standard rate premiums at the 1967 level. This premium could pay only $2.1 billion in first party benefits which is two-thirds of the loss of the catastrophe cases alone.

---

[37] *Id.*

[38] *Id.* at 278.

[39] *Id.*

[40] Hart, *National No-Fault Insurance: The People Need it Now*, 21 CATH. U.L. REV. 264 (1972).

It is submitted that it is correct to compare 1967 losses and 1967 premiums. Total premiums have increased every year since 1967 as premium rates and the number of drivers have increased. Losses must have increased as well, inasmuch as the prime elements of economic loss are wages and hospital and medical costs, which have greatly expanded in the years since the Department of Transportation data was published.

The conclusion states itself. If the DOT statistics are correct, then it will take $5 billion in gross bodily injury premiums to pay the economic loss of just those victims whose losses exceeded $25,000 and averaged $76,341 at the 1967 levels. The total standard limit premium at 1967 loss levels, adjusted upward to reflect more additional compulsory premium payers, would generate only $3.5 billion. The automobile owners who now buy standard limit policies would have to pay a 41 percent increase just to compensate 1 percent of the whole number of victims, even if it were assumed that no payment whatever would be made for the economic loss of the remaining 99 percent.

It is just this heavy cost burden which compels the proponents of many of the current no-fault schemes to curtail benefits. All the plans now in print put limits on wage loss and on death benefits, either in dollar limit per month or in time or total amount, or combinations of those ceilings.

The reasoning must have come, again, from the Mad Hatter: "The tort system does not compensate adequately those few victims whose losses average $76,000. Therefore, we must abolish the tort system and pay those losses with a first party system. It would cost too much to pay all those big losses from first party premiums. Therefore, we will pay only the smaller losses, which are presently being paid quite well by the combination of tort and multiple other systems."

It is Mad Hatter logic to suppose that the tort system was ever designed to pay the economic losses of all victims, or that it should be criticized because it does not do so. It is the purpose of the tort system to differentiate between right and wrong, between good driving and bad, and impose liability upon the wrongdoer for the whole loss he inflicts. Tort liability insurance is intended to help the wrongdoer pay his obligation, including the obligation to compensate for disability, suffering, and loss of enjoyment of life. The simple reason why the tort system does not compensate *all* victims is that many victims are totally wrong and have no just claim on other drivers for compensation.

The statistics for serious injury accidents show, as one would expect, a substantial number of single car, high speed accidents. The driver who leaves the curve at 90 m.p.h. in a high speed rollover, or the

driver who smashes into a bridge abutment or telephone pole, inflicts his loss upon himself. There seems no reason to require all *careful* drivers to pay for the heavy losses of the reckless, the speeding, or the drunken drivers.

A substantial number of serious injuries are inflicted in head-on collisions. A Department of Transportation study, *Price Variability in the Automobile Insurance Market,* investigated a series of claim files "reserved" by the insurance company at over $20,000. The study, which classified the type of accident which inflicted the heavy loss, shows that 50 percent were wrongside-of-the-road, head-on collisions.[41] Both drivers in a high speed, head-on crash are likely to suffer serious or fatal injury, but the driver who is in the wrong is not entitled to demand compensation from the driver in the right and ordinarily makes no claim.

It is true that even the innocent victim does not recover his full loss in many cases when those losses are in excess of $10,000 and in more cases when they exceed $25,000. Standard limits for liability insurance in most states are only $10,000 per person, $20,000 total per accident, and one-third of all insured's carry only the minimum. There are several solutions for this problem far less drastic than "pure" no fault. Manitoba and Ontario have $50,000 minimum limits. West Germany has a $68,000 (U.S. dollars) minimum. England requires unlimited insurance. If there is a true desire to secure full compensation for every innnocent victim, then higher minimum coverage requirements should be imposed.

The abolition of the guest passenger statutes in states—about half—which still cling to that old depression-born legislation would permit recovery by more victims. The adoption of comparative negligence would further enlarge the eligibility for tort recovery, even though the amount recovered would be reduced by the comparison of fault. The record of a large segment of the insurance industry in lobbying against comparative negligence and repeal of the guest passenger statutes makes one doubt that they sincerely wish to increase the number of compensated victims.

Another solution is underinsured motorist coverage in place of the present uninsured motorist coverage. The insurance industry is capable of writing and rating a policy which provides underinsured motorist coverage of $100,000, but it will not offer it. The usual *maximum* uninsured motorist coverage now offered is only $10,000. With underinsured motorist coverage, if the innocent victim were struck by a driver who had only a $10,000 liability policy, the underinsured coverage of the victim's own policy would provide the excess $90,000 coverage to make the $100,000 total. The driver who now carries high limits for his own

[41] U.S. DEP'T OF TRANSP., PRICE VARIABILITY IN THE AUTOMOBILE INSURANCE MARKET 238-40 (1970).

liability, which protects other drivers, ought to have the right to buy high limits to protect himself against both the uninsured and the low-limit insured driver, if he is willing to pay the premium.

The remedies proposed above are admittedly partial. They will allow more victims to recover and will provide higher limits of recovery in many cases. They will not provide compensation to the single-car accident driver (estimated at one-third of the fatal-or-serious injury class), nor to the driver on the wrong side of the road, nor to the driver who careens through the stop sign. The cost of paying the entire present and future loss of this class of fatally or seriously injured victims should not be imposed on the low-rated good drivers who constitute two-thirds of all present insureds. The poor risk drivers can, of course, insure themselves in the voluntary market.

There are excellent reasons for not requiring all drivers to share in the loss of the rare driver who crashes into a telephone pole. What is the no-fault argument for compulsory sharing of that cost? In a recent debate, a vice-president of Nationwide Insurance Company, which espouses its own plan for total abolition of all tort recovery, gave the Nationwide justification: "When society decided to make the automobile its primary form of transportation, society decided it would have slaughter and carnage on the highways, and therefore, it is the responsibility of society to pay the cost of all the losses the automobile causes." The proposition is glib and could well justify a totality of compulsory insurance schemes. For example: "When society decided to live in houses, it decided that its members would slip in bathtubs, fall down stairs, and make gas furnaces explode; therefore, society must pay all the losses caused by accidents in homes. When society decided to smoke tobacco, society decided to acquire lung cancer; therefore, society must pay, etc."

A better and valid syllogism would be: "When society decided to make the automobile its primary form of transportation, society decided to control driving patterns, and society published codes of driving conduct to make it safe. The driver who crashes the stop sign or stop light, who speeds, who tailgates, who passes on blind curves and crests, who fails to yield the right-of-way or who otherwise breaks the safety rules society has decreed, should be held liable to compensate the whole loss of his victim. If the private insurance industry wishes to sell him insurance against his risk of liability, society approves. If he wishes to buy first party insurance to protect himself when he is wrong, society approves. It is not society which causes slaughter and carnage on the highways, but those members who break society's rules. There is still a difference between right and wrong."

VIII. The Economic Impact of a Pure No-Fault System on Premium Levels

One of the questions in the *Public Attitudes Toward Insurance* survey financed by the Department of Transportation asked: "Suppose you had a choice between two kinds of auto insurance which cost about the same. Which would you prefer?" The kind called "Type Y" would pay: "All expenses of the accident (including medical costs and loss of earnings)," but "nothing for 'pain and suffering.' "[42]

The purpose of this section is to analyze whether it is economically possible to pay all of the medical expenses and all of the wage losses of all accident victims, regardless of fault, for the "same price" as present bodily injury liability insurance, even with the radical elimination of any payment for disability or undeserved suffering.

The summary report of the Department of Transportation study, *Motor Vehicle Crash Losses and Their Compensation in the United States,* discusses annual economic losses from automobile accidents under two different classifications. One is "societal economic loss," which includes the lost future earnings of all fatality victims, including those without dependent survivors and excluding consideration of the cost of future maintenance of the fatally injured wage earner.[43] The study later noted, however, that "it would not be rational to attempt to compensate all societal future lost earnings."[44]

The second classification of loss was "compensable economic loss." This concept included all the medical expense and wage loss of all the "seriously" injured victims (under the DOT definition of serious), but with significant deductions. In fatality cases the future cost of maintenance and personal consumption of the wage earner was deducted. The future earnings of those fatally injured persons who had no dependents were eliminated.[45]

Future wages were restricted to those which would be earned during a predicted "working life." All future losses were reduced to "present value." Under these criteria, "compensable economic loss" was about $4 billion less than "societal loss." The total compensable economic loss for all fatally and seriously injured victims, at 1967 wage and medical cost rates, were estimated at $5.1 billion annually.[46] This figure of $5.1 billion was said to be an understatement because "[i]t specifically

---

[42]Public Attitudes Toward Insurance, *supra* note 11, at 75.

[43]Vehicle Crash Losses, *supra* note 4, at 4-5.

[44]*Id.* at 5.

[45]*Id.* at 5-7.

[46]1 Economic Consequences, *supra* note 10, at 40.

excludes about a billion dollars in future lost earnings of young adults, living in households, who are either wage earners or potential wage earners."[47]

The major no-fault plans, such as the federal bill and UMVARA, would pick up these additional losses at the time a young potential wage earner would have entered the market, and would require "about a billion dollars" in loss to be paid in addition to the predicted $5.1 billion of annual compensable economic loss.

In addition to the losses of the fatally and seriously injured, there is substantial loss suffered by those injured less-than-seriously as the DOT study defined that term. The Department of Transportation estimates that there are 3,750,000 annual traffic victims whose economic losses are relatively minor. Their average medical loss was $131; their average wage loss was $81, and average replacement of service expense was only $12. These averages produce a total expense of $840 million.[48] It should be observed that the treatment given to the less-than-serious claims makes relatively little difference in the economics. Devices designed to pay only three-fourths of the wage loss instead of the whole wage loss, for example, would not affect the premium cost significantly, if applied to this great majority of cases.

The heavy loss is sustained by the 10 percent of all victims who are defined as serious or fatal cases. A major part of that loss is sustained by a small group of 45,000 people, about 1 percent of all the victims, who are said to sustain a loss averaging $76,000 each, which amounts to a medical and wage loss of $3.1 billion.[49]

In summary, 45,000 victims sustain a loss of $3.1 billion. The balance of the fatal-or-serious injury class, 468,000 persons, sustain a loss of $2 billion. The less-than-serious class, 375,000 persons, sustain a loss of $.84 billion. An additional class of seriously injured, potential wage-earning, young adults sustain a loss of $1 billion. Combining all the DOT studies, the annual compensable economic loss to be paid by a first party system, based on 1967 price indexes, is $6.94 billion.

An alternative number, excluding the young adults, given as total compensable economic loss (excluding property damage) for all victims, is $5.69 billion.[50] The difference in the two DOT sources is not reconcilable. A pure no-fault plan which will pay all of the economic loss

---

[47] *Id.*

[48] VEHICLE CRASH LOSSES, *supra* note 4, at 4-5.

[49] *Id.* at 6. The $3.1 billion figure was derived by deducting an estimated $.3 billion property damage from a total figure of $3.4 billion.

[50] *Id.* The $5.69 billion figure was derived by deducting $4.86 billion (property damage) from $10.55 billion (total compensable economic loss).

would need to take in a much larger amount in premium dollars than the annual loss figure in order to remain profitable. Empirical evidence seems to prove that the maximum pay-out to be expected in a non-group, individualized payment system is 60 percent of the premium. Most first party systems do not do quite that well.

If we apply a 60 percent pay-out and 40 percent retention factor to a $6.94 billion compensable economic loss estimate, then it will take $11.57 billion in premium dollars to pay the bill. The total national insurance industry premium income for 1967 was only $4.9 billion for bodily injury coverage. It would be optimistic to suppose that a compulsory system would pick up more than an additional 10 percent of premium payers. A 10 percent increase in 1967 actual premiums would produce available premiums of only $5.4 billion at 1967 rates, against a necessary premium intake level of $11.57 billion at 1967 cost levels.

A complicating factor is that Senator Hart's subcommittee hearings found that 35 percent of 1967 premium was for excess bodily injury coverages. This means that the standard state-minimum premium intake in 1967 was only $3.19 billion. If the DOT studies are accurate, the standard rate premium would have to be tripled to pay the 1967 level of losses!

Assume that a given no-fault plan will pay in first party benefits only the lowest level of compensable economic loss predicted in the DOT summary report—$5.69 billion. Then the table would show:

Compensable loss, at 1967 prices	$5.69 billion
Premium payments, bodily injury, 1967 total	$4.90 billion
Premium payments, 1967, at 10/20 rates	$3.20 billion
Increase with compulsory insurance (est. 10%)	$3.52 billion
Premium needed, at 1967 rates, to pay loss	$9.48 billion
Increase needed at standard rate (9.48-3.52)	$5.96 billion

To put the matter another way, the total bodily injury premiums earned by all insurers in 1967 for both standard and excess coverage, good risk and bad, was $4.9 billion. The gross bodily injury incurred losses in that year were $2.9 billion.[51] This was a pay-out percentage to the public of 59.2 percent of the premium, which is very close to the 60 percent optimum. (It is also a higher rate of return than Massachusetts no-fault has paid or is now paying even after all refunds, rebates, and rate reductions).

The total bodily injury premiums in 1967 would not even pay the $3.1 billion economic loss of the 1 percent of all victims who sustained catastrophic injuries. It could not pay any part of the straight loss

[51] A.M. BEST CO., BEST'S EXECUTIVE DATA SERVICE (1968).

of the remaining 99 percent of all victims. It could not pay any part of the value of the disability, disfigurement, suffering, loss of earning capacity, and other general damages of the innocent victims, whether temporary or permanent.

Obviously a system which promises to pay all the economic losses must collect enough premiums to meet the bill. If the DOT statistics prove that premiums must at least double, and for many drivers nearly triple, how can the actuaries for the American Insurance Association predict that their plan will pay all losses and yet lower the minimum and the average premium? Which figures are false?

IX. The Actuarial Crystal Ball

Three different cost studies have been done on the pure, substantially unlimited no-fault plans by the three major insurance groups: the American Insurance Association (AIA), the American Mutual Insurance Alliance (AMIA), and the National Association of Independent Insurers (NAII). In addition, there are cost predictions implicit in the Department of Transportation studies on the economic consequences of automobile accidents.

The cost estimates vary greatly, and in order to determine which study, if any, might achieve a reasonable degree of accuracy, it is necessary to analyze the basic assumptions and data underlying the actuarial predictions.

The AIA study is based on the analysis of about 7,000 closed claim files picked out of AIA member offices in several states about 5 years ago. The actuaries looked at the actual economic losses reported, the amounts paid on the claims under the existing system, and the claims denied. They attempted to forecast how the injured claimants would have fared under the no-fault system, and then produced a formula for loss frequency and loss amount or "severity," under the proposed no-fault system as compared with tort law loss experience in those states. Other factors were developed to compare adjustment costs under the two systems. It was assumed the insurance company expense retention would be the same under both systems.

AMIA took the same data published by AIA, but disagreed with the guesses as to claim frequency and severity, and produced higher factors. NAII in turn developed its own factors, or fractions, for loss frequency and amount and adjustment expense, but applied it to a different data base. The NAII predictions are based on about 27,000 claim files

reviewed, coded, and taped in the DOT study of closed *Automobile Personal Injury Claims.*[52]

The inherent flaw in all these studies is that insurance company records and data are assembled under the existing system. They simply do not show future wage loss and future medical expense after the settlement is completed. They do not show much economic loss existed over the policy limit. If a particular claim is handled under a $10,000 policy with a substantial defense of contributory negligence, it might be settled for $6,000 despite a lifetime of impaired earning capacity.

A serious fallacy in the AIA estimate is that no claim in its data base had medical expense of more than $20,000; and no claim had a wage loss for more than 99 weeks. Its actuarial formula for the cost of unlimited no-fault therefore predicts that no medical expense over $20,000 will ever be paid and no wage loss will ever be paid after 99 weeks.

AMIA adjusted the formula upward, based on California workmen's compensation experience showing that victims incurring greater losses were few in number but high in dollar amount. The NAII formula for dollar amount of potential claims is similar to the AMIA estimate, but differs sharply in its estimate of claim frequency.

How many more claimants will be entitled to benefits under a total no-fault plan? It must be remembered that the number of claimants now being paid are those who can show some fault on the part of another driver. Single car, single victim accidents account for many serious injuries—about a third according to DOT estimates. Other studies show that in the class of very serious injuries about half arise in head-on collisions on the wrong side of the road. The violating driver does not recover. The same is true in high speed intersection collisions. The light-crashing driver does not recover, nor is there any particular reason why he should.

The major study by DOT, *Economic Consequences of Automobile Accident Injuries,* stated that in the whole group of "serious" injuries, accounting for the major part of all economic loss, only 48 percent of all victims recover at all in tort.[53] This seems a reasonable figure based on the number of single car collisions with poles and abutements, single car rollovers, two car head-on collisions and intersection crashes. It is precisely these seriously injured victims who will certainly make claims under no-fault. These are not trival losses to be absorbed for fear of a rating change. If only 48 percent recover now, and 100 percent will recover under no-fault, then the present number of claimants with major

---

[52] AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 12, at 9.

[53] 1 ECONOMIC CONSEQUENCES, *supra* note 10, at 47.

loss must be increased by a factor of 2.13. Nevertheless, AIA used an increased claims factor of only 1.27. The AMIA study said that AIA was far too "conservative" and used a less "conservative" figure of 1.65. The NAII actuaries argue that their figure of 1.84 is more accurate, but will concede that even the 184 percent increase may give too low an estimate on the increased number of claimants under a no-fault system that pays for not only single car accidents, but also includes the unrecorded number of injuries arising from maintenance, entering, alighting, loading, unloading, and otherwise "using" an automobile. National Safety Council figures show that one-half times as many bed-disabling injuries come from car-related injuries (unreported in the tort system) as come from collisions. The number of claimants will have to double in any state which now has a reasonably honest claims system. Even the NAII estimate is too conservative and understates cost. Nevertheless, this prediction states that for the average driver presently paying the average premium for average coverage, the new premium under no-fault with the comparable average options will cost an *increase* of 42.3 percent.

AIA, AMIA, and NAII make cost comparisons based on present premiums for minimum coverage, which is generally $10,000/$20,000 bodily injury, $5,000 property damage liability, and uninsured motorist. Minimum coverage under no-fault is the basic economic loss coverage. The premium for property damage liability is nearly eliminated because liability for physical damage to motor vehicles is abolished. Cost comparisons take advantage of this "saving" of the property damage premiums. The comparisons are essentially deceiving. The good driver whose car is damaged in a rear end collision now will recover his total damage, without deduction, from the wrongful driver's insurance carrier. This right to recover has just as much actual value to the public as the cost the public pays for insurance against property damage liability. The cost of the premium is "saved," but at the same time the valuable right to recover from the third party is abolished. Physical damage to the automobile will be a loss imposed directly and completely upon the owner under no-fault. This is cost shifting, but not cost saving.

Heavy trucks impose a disproportionate risk of serious injury and death. In automobile-truck collisions, the death rate of automobile occupants versus truck occupants in 1967 was 63 to 1! The injury rate was 10 to 1. The accident rate per mile for trucks is higher than the rate per mile for automobiles. Claims against commercial vehicle owners are generally collectible and the owners usually carry high limits. The insurance premiums paid by commercial vehicle operators ought to be, and they now are, at a substantially higher rate than they are for private automobiles. The total amount of premiums paid by the truck-

ing industry is now large. Under the national no-fault bill, it will be relatively small. The truck owner's policy will be sold at a cost proportionate to the risk of loss. Most trucks are operated by the driver only, with no passengers. The sole risk of loss is the driver's medical expense and wage loss if he is injured or killed. Such losses are already paid by workmen's compensation benefits, which are deductible from the no-fault benefits under the major plans. Trucks will therefore impose a great risk of loss on other vehicles, but a slight risk of loss to the owner-insurer. Premiums for the heavy trucking industry should be reduced at least 90 percent. It must be obvious that the entire amount of premium dollars saved by the commercial vehicle owners will have to be imposed upon private vehicle owners to generate the premium income needed to pay for the injuries and deaths in the private cars.

About two-thirds of all drivers are rated as good risks for liability policies. The risk insured against is that the good driver will hit someone else under circumstances where he is to blame. Under full no-fault, if the good driver is hit when he is in the right, his own insurer must pay all his loss benefits and will not be able to recoup them from the careless driver's carrier (assuming subrogation is abolished). The unavoidable result of no-fault without subrogation is that even if total premium income remained the same for the whole class of insured drivers, two-thirds of the drivers (with "good" rating) would have to pay more, while one-third (with "bad" rating) would pay less. This does not seem fair to the good drivers who have a low risk of imposing losses on the whole system.

Urban drivers have, generally, a higher accident rate because of intense traffic congestion, but have lower accident severity because of lower in-city speeds. Rural drivers have a lower accident rate, a higher severity rate, and more single car wrecks. Under the major pure no-fault plans, the entire cost of the severe single car rural collision will have to be imposed on all drivers. The rural driver now enjoys a very low "fault" rate. He will pay a high no-fault rate.

The highly urbanized states will not have as high a premium increase as the more rural states. Even in the same state there will be a rate change. The driver in Cleveland, Ohio, can expect a rate increase, but it will not be nearly as large as the increase in Mechanicsburg, Ohio. The Manhattan driver may even get a slight reduction, but the North Dakota good driver can expect his real cost to more than double.

X. Massachusetts No-Fault—A "Successful" Failure

Governor Sargent of Massachusetts ran for office on a platform which promised the voters a no-fault plan that would pay more claim-

ants, pay claims immediately, and reduce costs. Under his sponsorship Massachusetts did enact a no-fault plan, which is at present the only plan that has been in operation long enough to determine whether no-fault will really serve the public interest. Will no-fault really eliminate delay in the payment of claims? Will it really pay more victims than now recover from tort and other first party benefit systems? Will the abolition of the "fault" criterion really reduce operating costs and claim handling expense? Will the consuming public receive from the insurance company a greater return of the premium dollar? The answer to all these questions, based on the Massachusetts record, is "no."

As might be expected, Governor Sargent proclaims the Massachusetts plan to be a great success, which it is only if "success" is defined as meaning extravagant profits for the insurance industry. The promise that the plan would pay *more* people has proved false. The plan pays fewer people, and pays each claimant far less than the tort system. The rate for bodily injury protection alone was cut 15 percent, but the benefits paid out were reduced far more than the rates were cut, and the rates for automobile physical damage were raised so high that overall cost to the average insurance buyer was substantially increased.

After the Massachusetts plan had been in effect for 6 full months, Governor Sargent issued a press release giving the claims statistics for the first half of 1971, comparing them to the statistics for the first half of 1970 when the fault system was in effect. According to the press release, the new system was working better than hoped. Senator Hart, a leading advocate of a federal no-fault plan, read into the Congressional Record of August 4, 1971, the complete text of the release.[54] Senator Hart's remarks indicated that he thought the figures proved the success of no-fault in Massachusetts and were worthy of study by the country as a whole. The country should indeed study the figures and be warned that the criterion for success is a plan that pays far less in benefits, keeps far more of the premium dollar in the insurance company's hands, produces a fantastic profit level for the insurer, and permits the same delays that were charged as a defect of the fault system.

In the table published, the "number of claims filed" means new claims received in the first 6 months of the respective years. The year 1970 was the last year of the traditional tort system, and 1971 was the first year of the new no-fault system paying personal injury protection benefits up to $2,000 to all automobile accident victims. The "number of claims paid" means the number of new claims received in the 6 month period and paid within that same period.

---

[54] 117 CONG. REC. 13077 (daily ed. Aug. 4, 1971).

	1970 (Tort) First Half	1971 (No-Fault) First Half
New Claims	66,401	31,103
Claims Paid	11,393	5,306
Average Payment	$343	$160
Total Payments	$3,907,799	$848,960

The figures indicate that only half as many claimants filed under the no-fault system as had filed in the comparable period under the fault system, which is the exact *reverse* of the bright promise of the no-fault proponents. It is well known that many people who have legitimate, small collision insurance claims elect not to file them against their own carriers for fear of surcharges, or loss of preferential good driver rating, or non-renewal. It may well be that the same fear operates to restrain the filing of legitimate no-fault claims. For whatever reason, the fact remains that only 47 percent as many claimants did file under no-fault in comparable periods. This does not prove "success." It proves an unfulfilled pledge to compensate more victims.

What was the efficiency in paying claims promptly? In 1970, under the fault system, only 11,393 of the 66,401 claimants were paid in the same 6 month base period in which the claim was filed. The ratio of one payment to six claims does indicate delay. This was undoubtedly due to insurance company delay in processing and in accepting liability under the fault system, and due also to the traditional reluctance of the insurer to pay out any part of premium dollars taken in. There has been no change under no-fault. In the first half of 1971, only 5,306 claims were paid to the 31,103 claimants in the same 6 month base period in which they were filed. The ratio is exactly the same as under the fault system—one out of six.

The promise that no-fault would pay far less to each claimant was fulfilled. The 11,393 claimants paid in 1970 were paid an average of $343 a claim for economic loss, liability and general damages. The total payment to these claimants was $3,907,799. In the comparable period in 1971, the 31,103 paid claimants received an average of only $160 for a total of $848,960.

According to the philosophy of Governor Sargent and Senator Hart, a plan is worthy of acclaim as a "great success" if the policy holders are required to pay 85 percent of the old premium, but the insurance company pays back the public only 21.5 percent of the old benefits.

After the Massachusetts no-fault plan had been in operation 9 full months, a different set of figures were released for publication by

the insurance commissioner and featured in an article in *Time*.[55] The published figures suggest the following comparison:

	1970 (Nine Months)	1971 (Nine Months)
Bodily Injury Claims	25,000	13,000
Average Amount Paid	$419	$165
Total Payments	$10,475,000	$2,145,000

The premium of the compulsory personal injury protection plan had been reduced, by legislative mandate, 15 percent from the 1970 rate for $5,000/$10,000 bodily injury liability coverage. The benefits paid out by the insurers were reduced, in the comparable 9 month periods, by 80 percent. As might be expected, the figures were said to prove success.

The fact that the policy-buying public had paid 85 percent as much, but the benefit-deserving public received back only 21.5 percent as much as before, meant that the insurance industry was building up enormous profit. Traditionally, the bodily injury liability insurers had regularly paid out more than 60 cents of the premium dollar to claimants, and retained for company expense and profit less than 40 cents. Under the new system, the insurers were retaining 86 cents and paying out only 14 cents of the reduced premium dollar.

The insurance commissioner let it be known he was considering ordering a rebate of part of the 1971 premiums, under a provision in the no-fault law unique to Massachusetts which allowed him to approve "provisional" rates. There must have been a flurry of activity in garnering in claims and establishing loss reserves to make the "loss incurred" numbers larger, because by year's end the amount of "loss incurred" was pushed up to a higher percentage of the premium dollar.

Figures for the entire year's operations by all writers in Massachusetts have recently been published, in conjunction with rate hearings, as compiled by L. M. Alexander, Actuary for the Massachusetts Automobile Rating and Accident Prevention Bureau, and as reported to Commissioner of Insurance Ryan.

The total premiums for all stock companies and all non-stock companies in the state, reported as "earned" for the compulsory bodily injury and no-fault benefit coverage, amounted to $133,938,000.

The total of all losses incurred in the calendar year was reported as $51,755,590, but this figure includes an "allocated loss adjustment expense" of $5,323,689. It follows that the amount of dollars either paid

---

[55]TIME, March 6, 1972, at 64.

or "reserved" and intended to be paid out to victims of automobile accident injuries totalled $46,431,901.

The loss payable to the public was only 38.4 percent of the total earned premium! It is interesting to note that the leading insurance writers in Massachusetts paid substantially less benefits than the industry average. The largest writer of all the stock companies, Travelers Group, earned premiums of over $16.7 million. Its loss incurred figure, exclusive of its "allocated loss adjustment expense," was only 29 percent of the premium. The largest writer among the mutual insurance companies, Liberty Mutual, earned premiums of $12.6 million, but reported a loss incurred figure, exclusive of "allocated loss adjustment expense," of only 31.3 percent of that premium.

The true cost of insurance to the public must be measured by comparing the price of the product with the units of goods or benefits delivered for that price. By way of simple example: if a 4 ounce chocolate bar sold for a dime, but were then reduced in price to a nickel, the true cost of the candy would be doubled if the amount of chocolate was reduced from 4 ounces in the old bar to 1 ounce in the new, cheaper bar.

The insurance industry throughout the United States has for over a decade, on average, paid out to deserving accident victims at least 60 percent of the premiums earned for bodily injury coverage. No-fault was heralded in Massachusetts as a more efficient, less costly, less wasteful system. If "efficiency" is measured by how much of the premium dollar is paid back to the public, then Massachusetts no-fault in actual practice was the most miserably inefficient of all insurance systems in 1971. The blunt fact is that the Massachusetts public was cheated when the return of the premium to the injured consumer was reduced from an industry average of 60 percent to a miserly 38 percent of earned premium.

The insurance commissioner has now denounced the extravagant profits produced by that low rate of return, has established by court action (resisted bitterly by the industry) his right to order a rebate, and has announced his intention to demand a retroactive rate reduction expected to be approximately 27 percent of the premium. Again, great publicity has been given to this new "saving" to the Massachusetts public, although none of the articles in the press have pointed out that no other state in the union permits its insurance commission to order *retroactive* rate adjustments. Indeed, in about half the states, the insurance commissioner cannot control the rates and cannot order even prospective reduction.

The most significant result of the Massachusetts experiment does not lie in the industry profit figures. It lies in the industry expense figures. The no-fault proponents have, from the outset, promised, and continue to promise, that no-fault will be far less costly to administer, that claims investigation and adjustment expense will be greatly reduced, and that the supposed cost efficiency will necessarily result in a far higher percentage of the premium dollar escaping from the industry's hands back into the public pocket.

Some skeptics have observed that no-fault claims will have to be investigated almost as completely as tort claims. Did the accident really happen? Was the claimant really injured? If so, how much, and for how long? Were his claimed medical expenses actually incurred and were they necessary and were they reasonable? Could the claimant return to work sooner than he did? Was he really employed? Would he have been laid off, even if uninjured? Was his disability really the result of old injury, preexisting illness or infirmity, or the result of the automobile accident? Are the results of last month's investigation still valid with respect to the payment of this month's claim? If the victim claims he has passed over the threshold which would allow a tort suit, can the insurer's legal and medical staff beat down the claim to make it sub-threshold and eliminate the suit?

Under a threshold no-fault plan, it may cost as much to investigate the preliminary question whether the claimant meets the threshold as it would to investigate his injury under the tort system. The mere investigation to determine whether an accident occurred will usually determine whose fault it was. In any system which allows insurance company subrogation, the investigation of fault will be made in any event. In short, the promise of cost saving may be false.

The Massachusetts figures prove the skeptics were right. It is a costly system. It is not only less efficient in paying out to the public, but is more costly to administer.

Let us assume that the industry is permitted to earn the 1 percent "underwriting profit" which, coupled with investment profit, will give them a reasonable return on their invested capital under Massachusetts rating law. Assume further that the actual losses incurred in 1971 are expanded by a speculated percentage to reflect the possibility that there are potential claims not yet known, and losses incurred but not reported. The all-company statewide accounting for the first full year of operation would then show actual losses, exclusive of allocated claim expense, of $46,431,901. This number was "developed" by the Rating Bureau to project loss incurred (to be paid out to the public) of $51,307,277. The total actual expenses were reported as $46,287,941,

which includes the arbitrarily allocated loss adjustment expense. A 1 percent underwriting profit should be added to the combined loss and expense figure to produce the theoretically correct premium. The result would be:

1971 NO-FAULT YEAR

Actual Expenses	$46,287,941
(Raw Losses Incurred)	($46,431,901)
"Developed" Losses	$51,307,277
Theoretical "Underwriting" Profit	$985,810
Theoretical Adequate Premium	$98,581,028

Assuming that the predicted "developed" losses have occurred, are properly reserved, and will be paid to the public as predicted, the actual performance record of the Massachusetts threshold type no-fault plan can then be given the following efficiency rating:

Total premium earned	100%
Actual reported total expense	47%
Losses paid back to the public	52%
Profit	1%

A comparison of these figures with industry leaders' cost, expense, and payout figures, and with the all-industry aggregates as published annually in A.M. Best Company's *Aggregates and Averages,* demonstrates beyond doubt that the no-fault system in the first state to report a full year's operation is more costly, more wasteful of expense, and more penurious in paying premium dollars back to the public than the traditional bodily injury liability insurance system.

The Massachusetts Legislature, clinging to its faith that no-fault was the panacea, extended the no-fault system to physical damage to automobiles in 1972 and abolished property damage liability. A limited exception exists. There can be liability for damage to property other than automobiles, such as store fronts, fences, and out-of-state automobiles.

A Massachusetts driver who carelessly smashes another citizen's automobile is completely immune from liability, provided he pays a compulsory premium of $21 a year to a private insurance carrier in order to preserve his immunity from liability as granted by the legislature. This plan should make the property damage liability field very attractive to the insurance industry, since the premium is for *no* benefits except for those few cases covered by the limited exception.

In order to evaluate the new rates for 1972 in Massachusetts, it is necessary to construct a profile of an average good driver in a metropoli-

tan area purchasing the usual package of insurance coverage. Consider a good driver in Boston who does not commute more than 10 miles a day, has no driving demerits, and has no youthful driver in his household. Assume he drives a Chevrolet Impala or Ford Galaxie. This man would be, under the Massachusetts system, a Class 10 driver (best rate), but would live in the highest rate classification area in the state.

His compulsory liability coverage would be only $5,000/$10,000. This is the lowest minimum limit in the nation, but is charged at the highest rate because of the pecularities of Massachusetts' experience. The cost for this coverage under the fault system in 1970 was $117, reduced by 15 percent in 1971 to $99.50, and reduced again by 27.6 percent in 1972 to $74.

At the same time the compulsory bodily injury liability rate was being reduced, however, the rates for property damage liability and collision coverage were being increased. The rate for property damage liability in 1970 was $49 and was increased by over 38 percent in 1971 to $67.80. When liability for damage to in-state automobiles was abolished in 1972, this rate dropped to $21. Rates for comprehensive, fire, and theft, which have remained about the same ($126 in 1970 and 1971), increased to $133 in 1972.

The crushing increase in Massachusetts has been in collision coverage. The cost of $100 deductible collision insurance for the Chevrolet Impala in 1970 was $161. This was increased in 1971 to $196 for a 1971 Chevrolet and increased again in 1972 for the same new car to an incredible $294. A chart of the result, for the common insurance package, is as follows:

	1970	1971	1972
Compulsory Bodily Injury or "Personal Protection"	$117.00	$99.50	$74.00
$5,000 Property Damage	49.00	67.80	21.00 (limited liability)
$100 Deductible Collision	161.00	196.00	294.00
	$327.00	$363.30	$389.00

This seems to demonstrate that the public cannot beat the system. While the rate for bodily injury went down, the rates for other coverage went up even more. The total dollars paid for the usual insurance package cost more than ever before, despite the reduction. The explanation has been offered that property damage and collision rates had to go up in 1971 because the rates had been frozen in prior years and were inadequate. That might explain 1971, but does not explain 1972 when prop-

erty damage liability was abolished. The old rate, on which the public got a substantial return, was $67.80 in 1971. The new rate in 1972, for almost no liability and very little return, was $21. The apparent saving of $46.80 was more than offset by the heavy increase in $100 deductible collision insurance from a supposedly adequate 1971 rate of $196 to a new 1972 rate of $294. The net increase in the physical damage coverage was $51.20 *additional* cost to the consumer for *fewer* benefits.

The Massachusetts public does not like the no-fault plan imposed on it. Two different public opinion surveys have proved public dissatisfaction and anger, despite claims by political figures that the public is happy with it. In a recent press interview, Insurance Commissioner Ryan was asked: "To make this reduction, aren't you taking away some benefits from one person to pay somebody else?" He answered: "Yes, that's true. That is what society wants today." Who says so? No public opinion poll yet taken shows that our society wants the rightful benefits of one person taken away to pay somebody else.

In mid-August 1971, Associated Press conducted a poll in the state and released its findings in a national dispatch which stated:

> The Massachusetts public is overwhelmingly critical of the state's first-in-the-nation no-fault auto insurance system, in effect since January 1, according to an Associated Press survey. . . .
> Only one person in the state contacted in a random survey had anything positive to say about no-fault, and that was a mild "pretty good." Everyone else was unhappy. To them the system simply does not work.

This poll was criticized by those who did not like the result as being "unscientific." Apparently it was thought that a "scientific" survey might find somebody who liked the plan, such as the Governor and the legislators who passed it.

A later poll was taken by Opinion Research Corporation of Princeton, New Jersey, an organization whose credentials in opinion sampling are not subject to criticism. The result was a similar, overwhelming rejection of the Massachusetts no-fault scheme. The interviews were conducted between November 29 and December 19, 1971, questioning persons injured in accidents between January and June, 1971. At that late date, 34 percent had not filed their claims. The claims of 25 percent were still unsettled. Only 28 percent, about one out of four, had filed claims, received settlement, and believed the settlement was fair.

With respect to rates, only 6 percent of all respondents thought their insurance costs had really gone down.

In a test situation, describing a typical accident, 91 percent said the driver at fault or his insurance company should have to pay for any

disability suffered by the victim and should also have to pay for the car damage. A solid 89 percent said the driver at fault or his insurance company should have to pay the medical bills and lost wages of the person he hit.

When asked specifically about the Massachusetts no-fault plan, only 23 percent thought it was fair. Some 15 percent had no opinion, and 62 percent expressed the positive opinion that it was unfair. That is, the number of those who say the plan is unfair is 2½ times greater than those who think Massachusetts no-fault is fair.

The final question in this survey described a comparative negligence system, where the driver at fault or his insurance company would have to pay damages in proportion to the degree of fault in causing the accident. This kind of system found public favor in the ratio of 8 to 1, with 10 percent opposed, 13 percent expressing no opinion, and 77 percent in positive favor.

In summary, the Massachusetts plan has played with rates, reducing some but increasing others to produce an actual increase in cost for the average driver. It pays fewer claimants and pays far less in benefits to those who do collect. Delays are just about the same as they always have been. The public does not like the system, and a strong majority believe it is unfair. The insurance industry loves the system, since its payout is a lower percentage of the premium dollar than it has ever been, and its profits are extravagant. The industry will love it less, now that the commissioner has established the right to order retroactive rebates.

This article has assumed that the reader is familiar with the Massachusetts plan. A brief summary might be in order. Under the plan, the motorist who is stopped at a light and is smashed from the rear, or the motorist who is hit head-on by a wrong-side driver, has no right to claim reimbursement for his loss from the driver at fault in about 95 percent of the cases. The state government compels him to buy back some of the rights he was born with by purchasing a compulsory health and accident policy. Under the policy he has paid for, he can claim reimbursement for his medical bills and for part of his wage loss (75 percent), provided that benefits from any wage continuation plan are first deducted. The maximum recovery is $2,000. If his losses exceed this figure, as they do in perhaps 5 percent of all injury cases, he can bring a tort suit against the wrongdoer, but has to deduct the no-fault benefits he purchased with his premium.

The innocent victim can sue for his general damages, disability, pain, and loss of ability to enjoy the normal pleasures of life, only if he meets strigent conditions. General damages are recoverable only (1) in

the event of death, or (2) if medical bills exceed $500, or (3) if there is actual loss, as distinguished from loss of use, of a body member, or (4) if there is disfigurement that is both permanent and "serious", or (5) if there is a fracture, or (6) if there is loss of sight or hearing. Note that there is no payment for *disability,* either partial or permanent. If a blow on the head produces brain injury changing the personality, diminishing intelligence, or producing traumatic epilespy, there is no right of recovery unless there is a fractured skull associated with it.

The condition that medical bills exceeding $500 will permit a tort suit favors the rich and discriminates against the poor. It is an ethical standard of the medical profession to set fees according to the ability of the patient to pay. A wealthy man may properly be charged $600 for the same treatment given to the poor man for $150. The wealthy man then could retain his traditional tort remedy.

A man permanently crippled through nerve paralysis resulting from a shoulder dislocation cannot recover for that disability, nor can anyone crippled by soft tissue damage to cartilage, ligaments, tendons, nerves, or blood vessels recover. Massachusetts only counts broken bones. It is cheaper that way.

Another feature of the Massachusetts plan is "subrogation." After the insurance company pays the first party no-fault benefits to its insured, the insurance company then pretends the fault system still exists and makes a claim against the insurance company of the other driver, if he was at fault, in order to get its money back.

That is the Massachusetts system in operation. Reduce one premium rate, increase the other rates even more, collect more total premiums, and pay back less in benefits.

XII. Alternative Plans

The most basic and important unit in our society is the individual. Americans have long believed that the individual is "endowed by [his] Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[56] The intangible values of life, including freedom from crippling disability, freedom to enjoy normal activities and pleasures, and freedom from agonizing pain are nearly as valuable as life itself. We have never believed in this country that the individual is only an economic machine with no value beyond his work week and no sensitivity to any loss except losses of the wallet. Tort law is founded on the principle that the unalienable right to the pursuit of

---

[56]Declaration of Independence (July 4, 1776).

happiness cannot exist unless every member of society recognizes his duty to exercise ordinary care not to destroy his neighbor's rights. The fault system rests on the bedrock concept of natural justice; and if one man carelessly injures his fellow man, the innocent victim ought to be compensated for his losses, and the wrongdoer is liable for those losses he has caused by violating the rule of careful conduct.

No-fault insurance will no more eliminate the actuality of fault than life insurance eliminates death. The effect of no-fault is to change the legal system and eliminate the rights of all innocent victims (in a "pure" plan) or nearly all (in the large threshold plans) to recover fair compensation for their whole loss. Is this abolition of fundamental legal rights really necessary?

If a modest first party health and accident system were combined with the present tort liability system, no increase in total premiums would be necessary. According to every analysis made by the Department of Transportation in its 2 years of studies, a no-fault benefit level of just $2,500 would pay in full the total wage loss and total medical and rehabilitation expense loss of 96 percent of all automobile accident victims. That would compensate in full 24 out of 25 people injured for their total out-of-pocket losses.

In addition, the other sources of first party benefits pay a large amount of the economic loss. Net reparations from medical pay, Blue Cross, sick leave, health and accident, and all other non-tort benefit sources combined paid $2.01 billion in 1967.[57] Presumably these benefit amounts have risen since then, just as liability premiums and benefits have risen since 1967.

Society's interests would seem to be well served if every victim had available $2,500 in automobile insurance benefits to pay for the initial medical care and initial economic shock of every collision. This is particularly so when $2,500 of primary benefit would pay in full the economic loss of 24 out of 25 victims, right or wrong, and would be supplemented by over $2 billion available from other first party systems. Additional first party benefits will certainly be offered, as they are now, in the voluntary private market for those who wish to buy.

At this level of benefits it should neither be necessary to restrict arbitrarily the tort remedy, nor to raise premium rates above those now prevailing. It should be observed that injury rates are declining due to safer automobiles and highways; insurance company loss-incurred figures have dropped markedly in the past year and a half; and the liability business has never been so profitable. There should be enough

---

[57] *See* VEHICLE CRASH LOSSES, *supra* note 4, at 14.

profit margin in present rates, particularly the medical pay insurance rates, to pick up the additional cost of modest wage loss benefits.

Maryland has recently enacted just such a plan, providing for $2,500 in first party benefits with no impairment of the tort remedy. It should be illuminating to compare the first year of Maryland's experience with that of Massachusetts, Florida, Michigan, and other states to see which plan best serves the public need, the public pocketbook, and the public sense of justice.

IMPLEMENTING THE NO-FAULT CONCEPT: AN ANALYSIS OF SOME ALTERNATIVES

RICHARD N. PEARSON*

In the late summer of 1967, the House of Representatives of Massachusetts created at least a minor sensation when it approved a no-fault automobile insurance bill[1] substantially similar to the Keeton-O'Connell Basic Protection Plan.[2] This legislative action came as a surprise to just about everyone, but the anti-no-fault forces quickly mustered their defenses, and the bill was killed in the Senate. As it has turned out, this was not a major defeat for the advocates of no-fault. The 1967 debate revealed widespread academic, editorial, and man-in-the-car support for change in Massachusetts. The no-fault concept was sent back to the legislative drawing board and emerged again in the fall of 1970 as the Massachusetts Personal Injury Protection Act,[3] which became effective Janury 1, 1971. Since then, other versions of no-fault have been introduced in many states and adopted in some, and now Mississippi has joined the roll of states actively considering adopting some form of no-fault automobile insurance.[4]

My purpose in this article is to analyze, in light of the relevant policy considerations, some of the alternatives available for translating the general no-fault concept into specific legislation. In so doing, I take no stand on the merits of no-fault in general. I do realize that the decision to adopt a no-fault plan cannot be entirely separated from decisions as to the particular features of the plan. But since others in this symposium argue the merits, this degree of artificiality is appropriate.

The issues which I will discuss are those of:

(1) Coverage,
(2) Fault of the injured person,

---

*Professor of Law, Boston University School of Law. LL.B. 1956, Boston University; LL.M. 1964, Yale University. Member, New Hampshire and Massachusetts Bars.

[1]H.R. 1844, Mass. Legis., 1967 Sess.

[2]R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM — A BLUEPRINT FOR AUTOMOBILE INSURANCE 302-39 (1965).

[3]MASS. GEN. LAWS ANN. ch. 90, §§ 34A, 34M, 34N (Supp. 1972); *id.* ch. 231, § 6D (Supp. 1972).

[4]H.R. 175, Miss. Legis., 1972 Sess.; H.R. 406, Miss. Legis., 1972 Sess.; S. 2135, Miss. Legis., 1972 Sess.

(3) Elements and measure of benefits payable,
(4) Collateral sources, and
(5) Residual tort actions.

In the course of dealing with these issues, I will discuss how they have been handled by the Delaware,[5] Florida,[6] and Massachusetts[7] no-fault statutes. For comparative purposes I will also refer from time to time to the Keeton-O'Connell plan and to the Mississippi bills. These plans illustrate the point that a commitment to no-fault does not inexorably lead to a pre-ordained statutory scheme.

I. Coverage

A. Persons Covered

The universe of motor vehicle accident victims can be described in the language of the typical automobile liability policy as those whose injuries are "caused by accident and [arise] out of the ownership, maintenance, or use" of a motor vehicle.[8] Under the rules of the traditional fault system, not all injured persons so covered are entitled to compensation from that system. The law of negligence allocates losses between persons injured and those causing the injuries on the basis of fault; liability insurance provides compensation only if the person causing the injury is liable under the law of negligence. That not all automobile accident victims are entitled to compensation is one of the most common criticisms of the fault system by the advocates of no-fault.[9] No-fault insurance is put forth as a way of achieving this compensation.

Nevertheless, the coverage formulas of many no-fault plans, including the Florida and Massachusetts statutes, do not provide coverage this comprehensive. Under the Massachusetts statute, for example, to be entitled to benefits, the claimant must have been injured "while in or upon, or while entering into or alighting from, or being struck as a pedestrian by" the insured's automobile.[10] Thus, coverage extends

---

[5]Del. Code Ann. tit. 21, § 2118 (Supp. 1971), as implemented by Del. Dep't of Ins. Reg. 9 (Oct. 1, 1971).

[6]Fla. Stat. Ann. §§ 627.730-741 (1972).

[7]Mass. Gen. Laws Ann. ch. 90, §§ 34A, 34M, 34N (Supp. 1972); *id.* ch. 231, § 6D (Supp. 1972).

[8]*See* 7 Appleman, Insurance Law and Practice § 4311, at 128 (1962).

[9]*See, e.g.*, New York State Ins. Dep't, Automobile Insurance . . . For Whose Benefit? 62-63 (1970) [hereinafter cited as Automobile Insurance].

[10]Mass. Gen. Laws Ann. ch. 90, § 34A (Supp. 1972). In one way, this is actually broader than the coverage in liability policies, for there is no requirement that the accident arise out of the "operation, maintenance or use" of the automobile. Thus

only to occupants of the insured automobile (including as "occupants" those on, entering into or alighting from it), and pedestrians struck by it, a group considerably smaller than the universe of automobile accident victims. Some of the exclusions of injured persons resulting from this coverage formula are explainable, but others are not.

One category of excluded victims are those who are neither occupants of the no-fault insured automobile nor pedestrians. Within this category are occupants of another no-fault insured automobile. In multi-car accidents, it makes sense to require an injured person to look to the no-fault policy covering the automobile in which he was an occupant. Giving injured persons the option of claiming against the insurer of an automobile involved in the accident would cause administrative headaches to insurers, with no particular advantage to injured persons. To this extent, the coverage formula does not serve to exclude accident victims from benefits, but operates rather to establish which no-fault insurer is to provide benefits.

Also in the category of non-occupant non-pedestrians are occupants of motor vehicles not covered by a no-fault policy, and as to these persons, the coverage formula does result in a denial of no-fault benefits. In Massachusetts, this subcategory is largely comprised of occupants of out-of-state automobiles, since as a practical matter all Massachusetts motor vehicles used for highway travel must be no-fault insured. Even here, the exclusion is not complete, for if the injured person is himself a no-fault insured, or a member of his household, he is entitled to benefits under his own policy.[11] Other Massachusetts residents may be picked up by the assigned claims plan, leaving non-resident occupants unprotected through no-fault.

And finally, in this category of non-occupant non-pedestrians are such persons as those on bicycles, horses, mini-bikes and snow-mobiles.[12] The policy considerations underlying these exclusions are not clear. If the Massachusetts Legislature had chosen a true two-party insurance scheme under which only those who pay premiums would be entitled

---

a person in an automobile injured by an exploding firecracker would seem to be covered, although he probably would not be under the conventional liability policy. *Cf.* Speziale v. Kohnke, 194 So. 2d 485 (La. App. 1967), *aff'd* 250 La. 469, 196 So. 2d 534 (1967).

[11]MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1972).

[12]It is possible that the courts might, by brute force, interpret the statute to characterize some of these as pedestrians. This bit of definitional slight of hand is to a degree built into Mississippi House bill 406. Section 2(h) defines a pedestrian as a "person who is not occupying a motor vehicle of any type." Thus persons on horseback, bicycles (unless motorized?) and on haywagons (but not on the tractor pulling them) would be "pedestrians" entitled to benefits.

to benefits, these exclusions would have been appropriate. But no such scheme was chosen, for occupants of the insured's automobile who are not otherwise beneficiaries of a no-fault policy and pedestrians — neither of whom pay into the no-fault fund — are entitled to benefits. To this degree, the Massachusetts Legislature has accepted the policy that in a non-fault system the costs of automobile accident injuries incurred by those who do not drive should be allocated to those who do.[13] But for reasons that are obscure, the legislature did not implement this policy fully.

Even as to pedestrians, the Massachusetts coverage formula is incomplete, for the requirement is that the pedestrian be struck by the insured's automobile. There is no such requirement under the fault system, and like the last subcategory of non-occupant non-pedestrian, this impact requirement is unjustified in policy.

In Massachusetts, these gaps in coverage are to some degree filled by an assigned claims plan, under which benefits are made available to one who "suffers loss or expense as a result of an injury arising out of the ownership, operation, maintenance or use of a motor vehicle . . . in any case where no personal injury protection benefits are otherwise available."[14] Although this is much broader than the basic coverage formula, benefits through the assigned claims plan are available only to Massachusetts residents and for injuries sustained "while the motor vehicle is upon the ways of the commonwealth or in any place therein to which the public has a right of access." Neither of these restrictions apply to claims made directly against no-fault insurers; so the gaps are not completely closed. In any event, the use of an assigned claims plan is a singularly peculiar way to cure defects in the basic coverage formula. If the persons excluded by that formula are worthy of receiving no-fault benefits, it is hard to see why the source of the benefits should not be the no-fault policy covering the automobile involved. An assigned claims plan is appropriate as a back-stop if the injured person cannot identify the automobile which injured him, or if the insurer is bankrupt; but it should not function, as it does in Massachusetts, as a primary source of benefits.

There are several differences in coverage between the Massachusetts and Florida statutes. In Florida, those covered are the operators and passengers of the insured automobile, and "other persons struck by such motor vehicle . . . while not an occupant of a motor vehicle or motor

---

[13] *See* p. 91 *infra*, for a discussion of the resource allocation argument, which supports this statement as to how accident costs should be allocated.

[14] MASS. GEN. LAWS ANN. ch. 90, § 34N (Supp. 1972).

cycle."[15] Thus non-occupants need to be pedestrians to be entitled to benefits, but like Massachusetts there is the requirement that they be struck by the insured automobile. Unlike Massachusetts, however, this gap is not filled by an assigned claims plan, for Florida has none.

The most important difference between the two statutes is not who is covered as such, but which motor vehicle must be no-fault insured. In Massachusetts, no-fault insurance is required for all motor vehicles required to be registered for highway travel.[16] But in Florida, no-fault insurance is required for private passenger automobiles only; it is not required for commercial vehicles.[17] This results in the denial of no-fault benefits not only to the occupants of commercial vehicles, but to anyone else not in a no-fault insured vehicle, such as a pedestrian injured by a commercial vehicle. There is no apparent reason for this substantial exclusion. If all persons so excluded were covered by other no-fault compensation systems, such as workmen's compensation, the exclusion would be understandable. Unfortunately, they are not, and to the extent that some are covered the decision to allocate accident costs to workmen's compensation, for example, can be accomplished by making workmen's compensation primary and no-fault insurance secondary, which has been done in Florida.[18] When measured against the reasons advanced to support the shift to no-fault automobile insurance, it should be of no significance that the vehicle causing the injury is commercial rather than non-commercial.

Of the three statutes discussed in this article, only Delaware's furnishes the comprehensive coverage of the fault system. Motor vehicles required to be no-fault insured are those required to be registered for highway travel.[19] Injured persons[20] are entitled to benefits if their injuries were "caused by accident and [arose] out of the ownership, maintenance or use of the insured vehicle."[21] This is an eminently more sensible approach than either that of the Massachusetts or Florida statutes.

---

[15]FLA. STAT. ANN. § 627.736 (1972).

[16]The definition of "motor vehicle" in MASS. GEN. LAWS ANN. ch. 90, § 1 (Supp. 1972), is applicable to the no-fault statute, section 34A.

[17]FLA. STAT. ANN. § 627.732 (1972).

[18]*Id.* § 627.736 (4).

[19]Del. Dep't of Ins. Reg. 9, Art. IV (1) (Oct. 1, 1971).

[20]Those injured while occupying the insured vehicle or injured in an accident involving the insured vehicle while not an occupant of another motor vehicle. *Id.*, Art. IV (5).

[21]*Id.*, Art. VI.

B. Geographic Coverage

Geography may be relevant to entitlement to no-fault benefits in two sets of circumstances: an accident occuring outside the state with the no-fault statute may involve a no-fault insured, or an accident occuring in the state with the no-fault statute may involve a non-resident.

As a starting point, it might be argued that a state's primary concern is with its own residents.[22] Thus, a no-fault statute might provide for benefits for in-state residents no matter where the accident takes place, and deny benefits to non-residents, even those involved in in-state accidents. But there is more to the issue than this.

Turning first to the resident involved in an accident in another state,[23] the use of private insurance limits somewhat a state's ability to furnish out-of-state coverage. The Mississippi Legislature cannot compel Louisiana drivers to buy no-fault policies for the protection of Mississippi residents. Of course, Mississippi could establish an assigned claims plan, or establish a state fund, which would compensate Mississippi victims of out-of-state accidents. The extent to which this should be done depends upon how the legislature defines the problems the no-fault statute is designed to meet. If, for example, the legislature is primarily concerned with court dockets "clogged with motor vehicle tort litigation,"[24] and the inefficiencies of the fault system there is little need for out-of-state coverage, since most of the claims will be processed in the state where the accident occurred.

On the other hand, if the legislature sees as the basic concern the need to compensate victims of automobile accidents, full coverage for state residents injured in out-of-state accidents would logically follow. This could substantially be accomplished by extending out-of-state coverage to all insureds and members of their households, whether they are injured while occupying the insured vehicle or not. Today, the large majority of persons live in a household in which there is at least

---

[22]I am using "resident" here in a very general sense to mean the same thing as "domiciliary" and "citizen." I realize that each of these words have different shades of meanings, especially in the context of particular laws. But for the purposes of this discussion, it is unnecessary to be concerned with the fine distinctions involved in these words. The legislative draftsman must, however, use care in picking the right word, or phrase, to accomplish the results desired.

[23]Out-of-state accidents involving residents are not limited to those in which residents are injured. They would include as well such accidents resulting in injury to out-of-state residents. As a practical matter, it is highly unlikely that any state would seriously consider compensation of non-residents in these circumstances, so I am limiting the discussion to residents who are injured.

[24]Pinnick v. Cleary, 271 N.E.2d 592, 602-03 (Mass. 1971).

one motor vehicle.[25] Those who do not are probably less likely to travel by automobile and consequently are less likely to be involved in out-of-state automobile accidents. An assigned claims plan could comfortably absorb the relatively rare case in which there is no applicable private policy.

Of the three statutes surveyed here, Delaware and Florida provide benefits for resident accident victims injured in out-of-state accidents. Under the Delaware plan, the insured and members of his household are covered while occupying the insured's automobile anywhere in the United States, its territories and possessions.[26] In Florida, coverage is extended to Canada as well.[27] It seems reasonably safe to say that the Massachusetts statute does not provide extraterritorial benefits, although this is not completely clear. And while the statute does establish an assigned claims plan, it only covers injuries sustained in accidents taking place in Massachusetts.[28]

Complete extraterritorial coverage however, can present problems of double coverage. If the accident occurs in a state that has a no-fault statute such as that of Florida, which provides some coverage for non-residents,[29] and under which benefits are primary,[30] the injured person might be entitled to benefits under two statutes. But the problem of double coverage has been satisfactorily worked out in workmen's compensation by permitting successive awards in two states and by deducting the amount of the first award from the second.[31] There is no doubt that a similar solution could be worked out for no-fault, so potential double coverage should not stand in the way of full extra-territorial coverage for residents.

The policies just discussed in connection with the out-of-state accident are also relevant to the in-state accident resulting in injuries to non-residents. If the primary legislative concern is with the overhead costs and inefficiencies of the negligence system, then perhaps non-residents should be covered, although these cases by themselves are not

---

[25]In 1970, 82 percent of families in the United States owned at least one automobile. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 536 (1972 ed.). Whatever meaning may be given to "family," it is less inclusive than "household," since the former as used in the *Statistical Abstract of the United States* includes only relatives by blood, marriage or adoption. *Id.* at 3.

[26]Del. Dep't of Ins. Reg. 9, App. A, Part III, Art III (Oct. 1, 1971).

[27]FLA. STAT. ANN. § 627.736 (4) (d) 2 (1972).

[28]MASS. GEN. LAWS ANN. ch 90, § 34N (Supp. 1972).

[29]FLA. STAT. ANN. § 627.736 (4) (d) 4 (1972).

[30]*Id.* § 627.736 (4).

[31]*See* 3 A. LARSON, WORKMEN'S COMPENSATION LAW §§ 85.10-85.70, at 369-83 (1972 Supp.).

likely to be so numerous as to constitute a substantial problem.[32] But if compensation of the injured is the dominant legislative purpose, a reasonable state chauvinism might suggest that the non-resident should look to his own state for no-fault compensation.

One problem of extending benefits to the non-resident is the effect the tort exemption will have on his rights under his state's negligence law. If a non-resident were to bring an action in Mississippi against a no-fault insured arising out of a Mississippi accident, the court would undoubtedly apply the tort exemption of the Mississippi statute. The most important aspect of this exemption, for the purposes of this discussion, is recovery for pain and suffering.[33] For example, section 20 of Mississippi House bill 406 bars recovery for pain and suffering unless medical expenses exceed $2500, or unless the plaintiff has suffered one of the listed serious injuries. But under the modern rules of conflict of laws, which make the law of the place of the accident no longer controlling,[34] such a tort exemption might well be ignored by the courts of the state of the non-resident, were he to bring suit there, either by direct action against the insurance company[35] or by personal service on the defendant in his state. One way to avoid the possibility of this interstate ingratitude would be to require the non-resident to agree to be bound by the tort exemption as a condition of his receiving no-fault benefits. But there is probably no way that the non-resident could be bound by the tort exemption should he choose to forego the no-fault benefits entirely and sue in tort in his home state.

II. Fault as a Bar to Recovery

If "no-fault" were a literal description, the fault of the injured person would have no impact on his right to compensation under a no-fault plan. But no plan recently offered for serious consideration totally eliminates fault as a barrier to recovery.

The initial proposal of Professors Keeton and O'Connell barred only a person injured as a result of acting intentionally to injure himself or someone else.[36] The opponents of the Keeton-O'Connell plan strongly objected to this as the sole barrier to recovery, and more recent proposals

---

[32]And if increasing numbers of states permit direct actions against insurance companies, non-residents are more likely to pursue their remedies in their home states. *See* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969); Webb v. Zurich Ins. Co., 251 La. 558, 205 So. 2d 398 (1967).

[33]The tort exemption in all its aspects will be discussed in a latter section.

[34]*See* Restatement (Second) of Conflict of Laws §§ 145-46 (1971).

[35]*See* note 32 *supra*.

[36]R. Keeton & J. O'Connell, *supra* note 2, at 304, 308.

include additional types of conduct as barriers to recovery, if they contribute to the claimant's injury. Under the three statutes surveyed here, these additional barriers are:

1. *If the claimant's injuries result from his operation of a motor vehicle while under the influence of alcohol or narcotic drugs.* These exclusions are optional with insurers in Massachusetts and Florida,[37] and mandatory in Delaware.[38] Whatever may be said in theory about preferring either mandatory or optional exclusion, as a practical matter it is unlikely to make much difference. Insurance companies will either routinely incorporate the exclusion or charge a higher premium in the absence of the exclusion.

The Florida statute requires a conviction before the claimant is barred. Massachusetts does not require a conviction, thus permitting an independent determination in a claim for benefits of whether the claimant was driving under the influence of alcohol or narcotics. The Massachusetts approach has the advantage – or disadvantage, depending on one's point of view – of making the criminal process irrelevant to the claim for benefits. There is no reason why this aspect of the claim should be treated differently from any other, but the requirement of a conviction puts the raising of the defense beyond the power of the insurer. Decisions not to arrest or not to prosecute are often made for reasons which have nothing to do with the strength of the case. Even if the criminal case does go to trial, the state has a higher burden of proof than is normally applicable in a civil case, and an acquittal may result from failure to meet that higher burden.

The requirement that there be a conviction will also delay the resolution of the no-fault claim until the criminal case has run its course.[39] Since insurance companies are not, and should not be, noted for paying claims they are not legally obligated to pay, this delay will occur even if the claimant can persuade the insurer that the criminal case is without merit.

Making the payment of no-fault benefits hinge on whether or not there is a conviction will also have an impact on the criminal process. Sympathetic police officers and prosecutors might in some instances decide not to arrest or prosecute if substantial benefits are likely to

---

[37]MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1972); FLA. STAT. ANN. § 627.736 (2) (b) 2 (1972).

[38]Del. Dep't of Ins. Reg. 9, App. A, Part I (Oct. 1, 1971).

[39]Under the Florida statute, the insurer does not have to pay a claim if it has "reasonable proof to establish that the insurer is not responsible for the payment." FLA. STAT. ANN. § 627.736 (4) (b) (1972). An arrest for operating under the influence of alcohol or narcotics should constitute the required reasonable proof.

hang in the balance. The hope for a sympathetic jury might lead some persons to insist on trial even in cases where the evidence of guilt is overwhelming.[40] In cases in which the evidence is less clear, the civil consequences of a conviction will be a potent weapon in the hands of prosecutors in inducing guilty pleas to lesser offenses, such as reckless driving.

Thus, although the requirement of a conviction furnishes an objective standard and limits the ability of insurers to chisel on claims, on balance the Massachusetts approach seems preferrable. Linking the criminal process with the civil puts alien pressures on both, and this is a cost which more than offsets the gain.

Finally, the requirement of a conviction results in real discrimination in cases where the injured person dies before conviction. In these cases, benefits would be payable no matter how clear the guilt, while those who live to be convicted would not receive benefits.

2. *If the claimant's injuries result from his commission of a felony.* As with the barrier to recovery resulting from operating under the influence, the Massachusetts statute does not require that there be a conviction of the felony.[41] But for some unexplained reason, neither does the Florida statute,[42] although a conviction is necessary for the "driving under the influence" bar to operate. As I have already indicated, my preference is to keep the criminal and civil consequences separate, but there is no particular reason why the two bars should be handled differently.

3. *If the claimant is injured while operating the motor vehicle without the consent of the owner.* This exclusion is contained in both the Massachusetts[43] and Delaware[44] plans, and is mandatory in both. In addition, the Massachusetts statute permits compensation only to authorized passengers, although it does not state whether the authorization must come from the owner or whether authorization from an authorized operator will do. Since the Delaware exclusion applies only to operators, the problem is avoided, but it does seem a bit peculiar that the unau-

---

[40]The hope for sympathy from police, prosecutors and juries has some basis in fact. *See* Campbell & Ross, *The Connecticut Crackdown on Speeding*, 3 L. AND SOC'Y REV. 33 (1968), in which the authors study the impact of a program of strict enforcement of speed limits, the purpose of which was to reduce the number of highway fatalities. They conclude, in part, that, "the courts, and probably also the police, are apparently unwilling to invoke penalties that might seem severe and unfamiliar in context." *Id.* at 52.

[41]MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1972).

[42]FLA. STAT. ANN. § 627.736 (2) (b) (3) (1972).

[43]MASS. GEN. LAWS ANN. ch. 90, § 34A (1969).

[44]Del. Dep't of Ins. Reg. 9, App. A, Part I (Oct. 1, 1971).

thorized passenger, even if he is aware of the lack of authority, has greater rights than the unauthorized operator.

The Florida statute contains no exclusion at all relating to unauthorized use, although what is probably the largest class of unauthorized users – automobile thieves – may fall within the "commission of a felony" exclusion. But in many states, taking an automobile without permission but with the intent to return it – euphemistically called "joyriding"–is a misdemeanor;[45] and under such a statute, the injured joyrider would be entitled to benefits under the owner's policy.

In substantial part, these exclusions, based as they are on the conduct of the injured person, are a tribute to the hardiness of the fault concept. They represent judgments that in these instances, injured persons are not deserving of compensation – not because they need it any less, but because their conduct is blameworthy. Whatever inconsistencies may exist between these exclusions and the policies advanced to support no-fault insurance, it is likely that at this moment in time the notions of individual responsibility which, in part at least, underlie the theory of the fault system are still politically alive. Certainly the proponents of no-fault were quick to accept these bars to recovery, and it is hard to imagine serious opposition to some form of inclusion in a Mississippi statute.[46]

III. Elements and Measure of Benefits

In the traditional negligence action the elements for which the plaintiff can recover are medical expenses, impaired capacity to earn, and pain and suffering.[47] The philosophy that compensation under

---

[45]*See* Slay v. State, 241 So. 2d 362 (Miss. 1970).

[46]Of the three proposals introduced in the Mississippi Legislature in 1972, house bill 406 is the least fault oriented. The only exclusions are for injuries that are intentionally self-inflicted or sustained by the claimant if he unlawfully takes the automobile without reasonable belief that he is entitled to take it. My guess is that the sense of the Mississippi Legislature is better expressed in house bill 175 and senate bill 2135, both of which have bars to recovery in addition to those discussed in this article.

[47]Property damage, of course, is also a recognized element of harm in negligence cases. The Delaware, Florida, and Massachusetts statutes all now incorporate in one way or another property damage coverage. The coverage is optional, and generally is little more than what is now called collision and comprehensive coverage, and so in itself represents little in the way of change. In Massachusetts, however, there is a complete tort exemption involving damage to motor vehicles subject to the statute. Miss. Gen. Laws Ann. ch. 90, § 340 (Supp. 1972). Thus, in Massachusetts no-fault property coverage is essentially the abolition of the common law right to sue for damage to insured motor vehicles. In Florida, the tort exemption is partial – if the owner elects not to carry first person property damage coverage, he can recover in tort only if the damage exceeds $550. Fla. Stat. Ann. § 627.738(4), (5) (1972).

no-fault should be based on economic loss, and that it should be easier to calculate than under negligence law, has resulted in significant changes.

Since in the conventional negligence action, compensation for medical expenses is generally based on out of pocket loss and is objectively determinable, no-fault has not wrought any particular change. Funeral expenses — while not exactly medical expenses — are covered by the three statutes discussed in this article, although the Delaware and Florida legislatures have indulged in a bit of additional social engineering by limiting the amount of compensation for such expenses to $2,000 and $1,000, respectively.[48]

The no-fault analogue to impaired earning capacity is generally income actually lost by the injured person as a result of the accident,[49] although the Florida statute is somewhat ambiguous, as the measure is stated to be "loss of gross income and loss of earning capacity."[50] However, conjecture is not entirely eliminated for loss of income (what the injured person would have earned but for the injury), since a claimant might be able to argue for compensation based on a job or rate of pay he did not have at the time of the accident, but would have had but for the accident. Massachusetts has dealt with this problem by basing lost income benefits for an employed person on his average weekly income for the year preceding the accident.[51] By looking backward instead of forward, a person whose income would have gone up but for the injury, or who was unemployed for part of the year, will be undercompensated. Overcompensation will result if a person's income, even apart from the injury, would be lower than the average for the previous year. These inequities seem too high a price to pay for the increased ease of calculating compensation.[52] But since the Massachusetts statute has a fairly modest limit of $2,000 on total benefits payable,[53] looking backward may not have much of an impact on how much injured persons actually receive.

---

[48]DEL. CODE ANN. tit. 21, § 2118(a) (2) (Supp. 1971); FLA. STAT. ANN. § 627.736 (1) (c) (1972).

[49]How "actual" the loss must be depends on how collateral sources are taken into account. This will be discussed in greater detail later.

[50]FLA. STAT. ANN. § 627.736 (1) (b) (1972).

[51]MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1972).

[52]The Massachusetts statute is probably patterned after workmen's compensation, under which lost income is also based on earnings prior to the accident. MASS. GEN. LAWS ANN. ch. 152, § 1 (1) (1958). But even under this section, periods of unemployment are excluded in calculating average weekly earnings, and under section 51, expected increases in pay can, in appropriate circumstances, be taken into account.

[53]MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1972).

The most important change in the way compensation under no-fault is measured is the elimination of compensation for pain and suffering. Whatever the roots in history – and these are unclear – there is a certain logic to pain and suffering recovery in negligence cases. Since the defendant's obligation to compensate the plaintiff is based on his wrongful conduct, it is not surprising that the law compels the defendant to pay the plaintiff something more than economic loss for the pain inflicted. But under no-fault, the obligation to compensate does not hinge upon anybody's wrongdoing, and logic may suggest that there should be no compensation for pain and suffering.

The theoretical argument does not end here. As Professor Calabresi has pointed out, pain and suffering is a real cost of accidents,[54] and for this reason he concludes there should be some compensation for this along with the more tangible losses, even in a non-fault system. This could be done, he suggests[55] by the use of predetermined schedules.

Whatever might be said in theory, the political reality is that such compensation will not be made a part of no-fault automobile insurance. None of the three statutes surveyed here include it, nor do they even provide for optional pain and suffering coverage as suggested by Keeton and O'Connell as a part of their Basic Protection Plan.[56] If no-fault is adopted, any compensation for pain and suffering will come from residual tort actions, which will be discussed later.

Unless the Mississippi Legislature is willing to consider striking out on paths not trod by others, the elements for which compensation are to be payable are unlikely to generate much controversy. General acceptance of the notion that compensation under no-fault should be for out-of-pocket losses and should be fairly easily determinable forecloses alternatives much different from those adopted in Delaware, Florida, and Massachusetts. But this does not in logic suggest that there should be any limit to the benefits payable other than actual economic loss. And yet of every plan with which I am familiar, all but one (the proposal of the New York superintendent of insurance)[57] contain a limit of some kind short of economic loss. The appropriateness of such limitations, or the level thereof, depends upon the purpose or combination of purposes the particular plan is designed to accomplish. Among the purposes which no-fault insurance is said to advance are several which should have an impact on this issue:

---

[54]G. CALABRESI, THE COST OF ACCIDENTS 215-25 (1970).

[55]*Id.* at 224.

[56]R. KEETON & J. O'CONNELL, *supra* note 2, at 310-11.

[57]AUTOMOBILE INSURANCE, *supra* note 9, at 87.

1. *Reduction of the price of insurance premiums.* In urban areas particularly, the cry is frequently heard that automobile insurance costs too much, and one of the major factors, if not *the* major factor, in the Massachusetts no-fault campaign was the high level of premiums.[58] In a recent survey sponsored by the Department of Transportation, the most frequent complaint about the automobile insurance system was its high cost.[59]

I take these criticisms to mean that the cost — more accurately, the price — of insurance is too high in some absolute sense, not that insurance is not worth its price. If the purpose then is to reduce the price of insurance, a relatively low limit on no-fault benefits would be advisable. Recent studies indicate that personal injuries involving relatively low economic loss account for a small share of the aggregate personal injury losses. According to the Conard study of automobile accident personal injuries in Michigan covering the year 1958, 94 percent of the personal injuries involved individual economic loss of $2,999 or less, but in the aggregate these injuries accounted for only 34 percent of the total loss. The 3 percent of the injuries involving individual loss of $10,000 or more accounted for 57 percent of the total loss.[60] So as the limit of benefits payable increase, there is a disproportionately greater increase in total benefits to be paid out, thus calling for a disproportionately greater increase in no-fault premiums.

But even this understates the impact on premiums as the limit on benefits increases, for as the amount of individual economic loss increases, the proportion of the loss now compensated for under the tort system decreases. According to the Department of Transportation (DOT) serious injury study, the total economic loss from injuries involving individual loss of $1,499 or less was $131,099,000 in 1967. Under the tort system, those losses were compensated for in the amount of of $113,759,000, or about 87 percent of the total loss. For injuries with individual economic loss of $2,499 or less, the total loss was $342,291,000, with tort compensation of $224,063,000, or just over 60 percent of the total loss. The total economic loss from all injuries was $5,126,595,000,

---

[58]"It is . . . imperative that the state make good on its promise of lower rate automobile insurance. . . ." Address by Governor Sargent, Massachusetts Senate and House of Representatives, Aug. 17, 1970.

[59]U.S. DEP'T OF TRANSP., PUBLIC ATTITUDES TOWARD INSURANCE 24 (1970). Although the most frequently mentioned undesirable feature, cost was mentioned by only 44 percent of the respondents. But only 4 percent mentioned cost as a desirable feature.

[60]A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 145 (1964) [hereinafter cited as AUTOMOBILE ACCIDENT COSTS AND PAYMENTS].

with the total tort compensation amounting to $813,105,000, or less than 16 percent.[61] Thus, with a benefit limit of $1,499, full compensation by no-fault insurance would require only a 15 percent increase in payments to injured persons, while full compensation for all economic loss resulting from personal injuries would require an increase in payments of more than 600 percent.

The additional amount, if any, needed to finance the increased payments for economic loss under no-fault will depend on things other than just the limit on benefits payable. If the supporters of no-fault are right, there will be savings in overhead expenses and attorney's fees under no-fault, and changes in the collateral source rule (to be discussed later) offer opportunities to reduce the amount paid by no-fault insurance to injured persons. But there would seem to be little doubt that a limit far short of actual economic loss would be necessary to keep insurance premiums even at the present level. While this article is not intended to be a contribution to the much debated issue of whether premiums under no-fault would be cheaper than under the negligence insurance system, the conclusion I reach here seems to follow as a matter of relatively simple arithmetic from the serious injury study of the DOT. For example, if the limit on no-fault benefits payable were pegged at $10,000, the aggregate economic loss for which there would have to be compensation is $1,162,462,000. If no-fault insurance were to be secondary, this amount would be reduced by $350,290,000, the amount of compensation from medical insurance, sick leave, workmen's compensation and social security. This leaves $812,172,000 in losses to be compensated by no-fault, of which $519,036,000 is presently recovered in tort.[62] Accepting as valid the conclusion that under the present system only 44 percent of the current premium dollar is paid to victims for compensation,[63] about $1,180,000,000 in premiums would be needed to finance the current tort recovery. Under no-fault, the "efficiency" rate would have to be raised from 44 percent to 70 percent to secure the necessary compensation without a raise in premiums. But even this efficiency rate would not turn the trick if no-fault were primary rather than secondary. Furthermore, these calculations are based on the DOT serious injury study, and thus do not include losses

---

[61] 1 U.S. DEP'T OF TRANSP., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 89-90, 154-56 (1970). These figures do not include all personal injuries, but only those which were characterized as "serious" for the purpose of the study. It is unlikely, however, the proportionate disparity between economic loss and tort compensation would be affected greatly if all injuries were included.

[62] These figures are taken from tables 7FS[1] and 15FS[1], *supra* note 61.

[63] *See* P. KEETON & R. KEETON, COMPENSATION SYSTEMS: THE SEARCH FOR A VIABLE ALTERNATIVE TO NEGLIGENCE LAW 58 (1971).

for non-serious, but nonetheless compensible, injuries. These calculations also ignore losses for injuries with individual economic loss exceeding $10,000, for which there presumably would still be compensation under the fault system, and for which premiums would have to be collected. The aggregate net tort compensation for such injuries was $294,068,000, which in itself would bring the combined no-fault-negligence payout up to $1,106,240,000, which is within an eyelash of the amount of premiums necessary just to compensate for serious injuries under the $10,000 loss level.

2. *Reduction of the time lapse between the accident and compensation.* The charge is often made that the delay involved in compensating under the fault system is often so long as to be unconscionable.[64] How long is too long is of course a value judgment. In one sense, any delay is too long — all of us prefer to be paid what is due us sooner rather than later. But beyond this, whether the delay under the fault system is too long depends on the need the injured person has for compensation before he gets it. While there are studies that tell us the time lapse between the date of the accident and the final tort settlement,[65] they do not reveal the extent to which tort compensation is needed earlier. Collateral sources, personal savings, and modest adjustments in living style, no doubt enable many injured persons to wait out the settlement process with only minor inconvenience. Moreover, any study which measures the lapse of time between the date of the accident and tort compensation exaggerates somewhat the delay. The key time span is between the date an economic loss is incurred, which typically comes some time after the accident, and the date of payment. Medical bills are incurred and income is lost not at the moment the person is injured, but over a period of time thereafter. It is when these losses actually occur, and not on the date of the accident, that the need for compensation arises. Thus, the magnitude of the problem caused by delay in tort compensation remains to some degree speculative.[66]

Nevertheless, there is little doubt that no-fault would reduce somewhat the time which is taken to pay claims. Doubts about liability, the difficulty of evaluating the intangible elements of tort damages,

---

[64]R. KEETON & J. O'CONNELL, *supra* note 2, at 1-2.

[65]AUTOMOBILE ACCIDENT COSTS AND PAYMENTS, *supra* note 60, at 221-23; 1 U.S. DEP'T OF TRANSP., AUTOMOBILE PERSONAL INJURY CLAIMS 83-97 (1970).

[66]In the DOT public attitude survey, *supra* note 59, 10 percent of the respondents, when asked to list undesirable features of the automobile insurance system, mentioned delay in processing claims. *Id.* at 24. In response to more specific questions, 23 percent thought there was a long delay in settling claims with their own insurance companies, and 32 percent felt the same about the other party's companies. *Id.* at 26.

and the one-shot nature of tort compensation all combine to postpone payment, even in the absence of litigation.

The implications that this discussion should have on the limit of benefits payable is to a degree uncertain. The fact that the delay is longest with injuries involving fairly high economic loss[67] would suggest a high limit, or none at all. But even a relatively low limit might be enough to tide many seriously injured persons over until the tort settlement comes in. Nevertheless, in the absence of hard data about the actual impact of delay, one can only speculate that while a few dollars of benefits received promptly will help, the hardship caused the most seriously injured will only substantially be relieved with a high limit on benefits.[68]

3. *Elimination of existing unfairness in the distribution of compensation.* As recent studies make clear, in the aggregate, injured persons suffering relatively low economic loss recover from all sources compensation in excess of loss, while those suffering high economic loss recover less than loss.[69] The advocates of no-fault argue that this overcompensation of some and undercompensation[70] of others is unfair, and it is one goal of no-fault to reduce or eliminate this unfairness.

The magnitude of this disparity is indicated by the DOT serious injury study.[71] For instance, for injuries involving individual economic loss of up to $999, the aggregate loss was $51,215,000, and the total compensation from all sources was $83,236,000. For injuries involving loss of $10,000 or more, the aggregate loss was $3,964,133,000, for which there was total compensation of $1,271,336,000. If compensation from collateral sources is eliminated from the compensation figures, the disparity is even greater. For losses of $999 or less, the net tort com-

---

[67] *See* AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 65, at 87.

[68] It is unlikely that a low limit will have a significant impact on the delay in compensation caused by litigation. According to the Conard study, only 5 percent of injured persons filed suit, and of this number only 15 percent actually went to trial. And suit was filed in a substantial proportion of cases only when economic loss exceeded $3,000. AUTOMOBILE ACCIDENT COSTS AND PAYMENTS, *supra* note 60, at 237-41.

[69] AUTOMOBILE ACCIDENT COSTS AND PAYMENTS, *supra* note 60, at 179; U.S. DEP'T OF TRANSP., *supra* note 61.

[70] "Overcompensation" and "undercompensation," like "unconscionable delay," involve assertions of value and not just of fact. To determine whether there is too much compensation or too little, there must be a standard of measurement, and the choice of that standard is a value choice. The standard used to support the conclusion that the fault system overcompensates small claims and undercompensates large ones is economic loss. Economic loss, of course, is not the sole standard for measuring damages in the fault system.

[71] U.S. DEP'T OF TRANSP., *supra* note 61.

pensation was $52,562,000, or just about equal to total economic loss. But for the $10,000 and over losses, the net tort compensation was $294,068,000, or less than 10 percent of loss. Thus, the overcompensation of smaller losses could be eliminated by abolishing the collateral source rule; but the undercompensation of the most serious losses would be increased.

It is clear that the only remedy for this uneveness in the distribution of compensation is a no-fault plan without limit on the benefits payable. As the amount of individual economic loss increases, the disparity between compensation and loss becomes greater.

The undercompensation of the very seriously injured has been a target of criticism by the advocates of no-fault.[72] If this is thought to be a problem, it is clear that a limit on benefits payable of as high as $10,000 would leave it unsolved. According to the DOT serious injury study,[73] compensation from all sources about equaled economic loss for injuries involving loss of up to $9,999. For individual loss exceeding this, the aggregate uncompensated loss was $2,692,797,000.

But how great a *social* problem this creates is an open question. The serious injury study indicates that in 1967, 31,417 persons suffered economic loss of between $10,000 and $24,999, and 45,153 suffered economic loss of $25,000 or more.[74] Of these, 68 percent and 96 percent respectively received less compensation than loss.[75] Thus, of the most seriously injured, only 64,711, or less than .05 percent of the population, received less than economic loss. In terms of actual impact, surprisingly few of these seriously injured persons suffered substantial hardship. For example, only 8,756 had to move to cheaper housing, only 18,737 had to borrow money, and only 34,412 had to "change their way of living."[76]

4. *Reflection of accident costs, in the cost of driving, so that resources will be properly allocated.* The argument, based on classic free enterprise ideals, for including accident costs in the price of driving has its best recent expression by Professor Calabresi:

> The general deterrence approach treats accident costs as it does any other costs of goods and activities — such as the metal, or time it takes, to make cars. If all activities reflect the accident costs they "cause," each individual will be able to choose for

---

[72]*See* 116 CONG. REC. 31519 (1970) (remarks of Senator Hart).

[73]U.S. DEP'T OF TRANSP., *supra* note 61.

[74]U.S. DEP'T OF TRANSP., *supra* note 61, at 89-91.

[75]Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207, 214 (1971).

[76]U.S. DEP'T OF TRANSP., *supra* note 61, at 362-63.

himself whether an activity is worth the accident costs it "causes." The sum of these choices is, *ex hypothesis,* the best combination available and will determine the degree to which accident-prone activities are engaged in (if at all), how they are engaged in, and who will engage in them. Failure to include accident costs in the prices of activities will, according to the theory, cause people to choose more accident-prone activities than they would if the prices of these activities made them pay for these accident costs, resulting in more accident costs than we want.

. . . .

For the theory to make some sense there is no need to postulate a world made up of economic men who consciously consider the relative costs of each different good and the relative pleasure derived from each. If the cost of all automobile accidents were suddenly to be paid out of a general social insurance fund, the expense of owning a car would be a good deal lower than it is now since people would no longer need to worry about buying insurance. The result would be that some people would buy more cars. Perhaps they would be teen-agers who can afford $100 for an old jalopy but who cannot afford — or whose fathers cannot afford — the insurance. Or they might be people who could afford a second car so long as no added insurance was involved. In any event, the demand for cars would increase, and so would the number of cars produced. Indeed, the effect on car purchases would be much the same as if the government suddenly chose to pay the cost of the steel used by automobile manufacturers and to raise the money out of general taxes. In each case the objective would be the same. In each, an economist would say, resources are misallocated in that goods are produced that the consumer would not want if he had to pay the full extent of their cost to society, whether in terms of the physical components of the product or in terms of the expense of accidents associated with its production and use.[77]

Our society has, of course, never relied solely on the marketplace for resource allocation decisions. We outlaw many activities — such as prostitution — which would thrive in an open market, and we subsidize other activities — such as police forces — which the market would not support.

Even in those activities which we leave to the general control of the market, we have never attempted to make a complete allocation of accident costs to activities. Probably the closest approximation is workmen's compensation. One of the slogans used in the campaign to adopt workmen's compensation was that "the cost of the product should

---

[77]G. CALABRESI, *supra* note 54, at 70-72 (1970) (footnotes omitted).

[78]W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530 (4th ed. 1971).

bear the blood of the workman."[78] But even this philosophy has not led to full compensation for industrial accident losses. Nor has the liability of manufacturers and suppliers of products been expanded this far. It is not enough that a person be injured in using a product; to recover, he must show that it was defective, either in manufacture or design. Thus, a scheme whereby all accident costs would be reflected in the price of automobiling would not only be a marked departure from the traditional law relating to automobile accidents, it finds no analogue in other areas of accident loss allocation. Nevertheless, the resources allocation argument has been used by its advocates to support no-fault insurance.[79]

If the resource allocation argument were to be implemented by a no-fault plan, there would be no limit on the amount of the benefits payable. As I have already pointed out, it is only with individual economic loss of $999 or less that present total tort compensation approximates total economic loss.

At least in terms of policy, the arguments supporting a high limit on benefits, or none at all, seem more persuasive. Only a dominating concern with the price of insurance would justify a low limit. It is that concern which was preeminent in the Massachusetts debate, and it is one that has a good deal of popular appeal. But it is doubtful that in the long run society will be well served by a plan, one of the main purposes of which is to deliberately reduce the cost of driving. With the present level of traffic congestion and the pollution caused by automobiles and the factories that build them, it is arguable that we should encourage public transportation, rather than making driving cheaper and thus encouraging automobile transportation.

Nonetheless, all three of the statutes discussed in this article place limits on the amount of benefits payable. The range is a fairly wide one. Massachusetts, as a result of its primary concern with the level of insurance premiums, has the lowest with an overall limit of $2,000. In addition there is a 75 percent limit on lost income benefits.[80] Dela-

---

[79] *See, e.g.*, R. KEETON & J. O'CONNELL, *supra* note 2, at 259-60. It should be pointed out that initially the costs of automobile accidents, except those of pedestrians, are borne by those engaged in the activity of automobiling. Professor Calabresi argues that unless there is a "pay at the door" feature, such as insurance, some of these costs will not be reflected in the choice of whether to drive or not because some costs will be externalized. Externalization occurs when the cost of one activity shows up as a cost of a different activity. A common externalization involving automobile accidents occurs when medical expenses are paid by general health insurance rather than by automobile insurance. Such expenses are thus made a part of the general cost of living rather than of automobiling. G. CALABRESI, *supra* note 54, at 144-50.

[80] MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1972).

ware has the highest limit, $10,000, although there is an additional limit of $20,000 for one accident.[81] Florida has a limit of $5,000.[82]

Beyond the uniform, applicable to all limit on benefits payable, all three statutes make available optional deductibles, which if elected will further limit the amount of benefits. In Massachusetts, the deductible may be as high as $2,000,[83] the full limit of no-fault benefits. In Florida, the maximum deductible is $1,000.[84] The Delaware statute requires insurers to offer deductibles, but no amount is specified.[85] If elected, the deductible applies to the insured and members of his household. Furthermore, a person subject to a deductible cannot recover benefits within the applicable deductible under another no-fault policy.

Since the vast majority of people in this country live in a household in which there is at least one automobile,[86] no-fault insurance becomes, when coupled with the tort exemption (to be discussed later) and the deductible, little more than an abrogation of the common law negligence action, and the replacement of it with voluntary self-insurance for medical expense and income loss.

If this principle of freedom of choice to self-insure or not is accepted as valid, then it would seem to make more sense to require insurance companies to offer policies with varying deductibles and varying limits, or no limit at all. Owners would be free to choose among policies with varying deductibles and limits, or to choose not to insure at all.

And there is little reason for not extending the same principle of voluntary self-insurance to the relative few who do not live in automobile-owning households. It might be argued that it is unfair to make these people self-insure against accidents caused by someone else; but this argument is generally inconsistent with the concept of no-fault insurance, and it is specifically rejected by making an owner's election of a deductible binding even if he or a member of his household is injured in someone else's automobile. It might also be argued that separating accident insurance from the automobile for persons in non-automobile owning households will result in externalizing accident costs.[87] But the overall limit on benefits payable and the presence of the deductible itself evidences little concern with the resource allocation argument.

---

[81]DEL. CODE ANN. tit. 21, § 2118 (a) (2) (Supp. 1971).
[82]FLA. STAT. ANN. § 627.736 (1) (1972).
[83]MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1972).
[84]FLA. STAT. ANN. § 627.739 (1972).
[85]DEL. CODE ANN. tit. 21, § 2118 (a) (2) (B) (Supp. 1971).
[86]*See* note 25 *supra*.
[87]*See* note 78 *supra*.

In short, the optional deductible feature seems rather strange in light of the arguments advanced in favor of substituting compulsory first party insurance for the fault system. However, if one thinks that a tip of the hat toward the notions of freedom which the deductible reflects is appropriate, then the permitted deductible should be a small one and should apply only to the owner and members of his household when injured in their automobile.

IV. Collateral Sources

A common object of criticism in the fault system of allocating losses is the collateral source rule, which permits a plaintiff to recover damages from the defendant without regard to other sources from which compensation may have been had for the same injury. This rule, we are told, permits "wasteful overlapping" of benefits.[88] Assuming that this double compensation should be avoided, as it probably should be, it does not follow that no-fault insurance should be secondary and collateral sources primary, which would be the result if the collateral source rule were simply abolished.

At first glance, the order in which sources of compensation are looked to might be a matter of indifference. Since the cost of the source of compensation will reflect the amounts of compensation paid out, making, for example, no-fault primary and general medical insurance secondary will increase the cost of the former but decrease the cost of the latter. But a closer look reveals factors which suggest that the order in which sources of compensation are used does make a difference.

One of these factors is the lack of complete identity of the classes of no-fault insureds and collateral source insureds. If collateral sources are primary, the cost of no-fault insurance will be less, even to those who do not themselves pay for collateral source insurance. But since the reduced cost of no-fault insurance resulting from collateral sources will be spread among all no-fault insureds, including those without collateral sources, the reduction in the cost of no-fault insurance will be less to those with collateral sources than the increase in the cost of the collateral sources. In effect, those with collateral sources will subsidize those without. An even greater subsidy is extracted from those who pay for collateral sources but not for no-fault insurance — those who live in non-automobile owning households — for this group gets no benefit at all from the reduction in no-fault insurance premiums caused by making collateral sources primary.

---

[88]R. Keeton & J. O'Connell, *supra* note 2, at 401. *See also* Automobile Insurance, *supra* note 9, at 30-32.

In addition to this unfairness to those with collateral sources,[89] making collateral sources primary will result in the externalization of automobile accident costs whenever collateral sources are used to compensate for automobile accident losses. The cost of driving will be understated, and as a result, resources will be misallocated.[90]

On the side of making no-fault insurance secondary is that it is somewhat easier to accomplish. A simple provision in the statute defining the loss for which benefits are to be available as economic loss less collateral source payments will do the job. If no-fault insurance were made primary, double compensation could only be prevented by prohibiting collateral sources from paying benefits until no-fault benefits are exhausted. While drafting such a directive may be simple enough, enforcing it may not be so easy. If automobile accident victims are as dishonest as we are led to believe,[91] there will be some attempted concealment from the collateral sources of the circumstances giving rise to the claim in order to get double compensation. While there would be the same temptation to conceal collateral sources if no-fault insurance were secondary, it would be fairly easy for insurers to determine the existence of employment related collateral sources, which undoubtedly account for the large majority of such sources.

Another point that has been made in favor of making no-fault insurance secondary is that typically collateral sources are more efficient than automobile liability insurance —— a higher percentage of the premium dollar is paid out in benefits by collateral sources.[92] But this is less persuasive if the predicted efficiency of no-fault insurance becomes realized.

Of the three statutes discussed in this article, only Delaware's shows a great deal of concern with double compensation. No-fault insurers are "subrogated to the rights, including claims under any Workmen's

---

[89]I realize that "unfairness" is a value loaded word, and this subsidization by those with collateral sources of those without may be regarded by some as a positive social benefit. To the extent that those with collateral sources tend to be more affluent than those without, making collateral sources primary is one way of redistributing the wealth.

[90]"The motoring public should bear the cost of motor vehicle accidents. We recommend, therefore, that benefits due to the insured from collateral sources . . . should not be subtracted in determining the amount of economic loss sustained as the result of an automobile accident. At the same time, duplication of benefits is undesirable and should be precluded wherever possible." AMERICAN INS. ASS'N, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS 5 (1968).

[91]*See* R. KEETON & J. O'CONNELL, *supra* note 2, at 3.

[92]AUTOMOBILE INSURANCE, *supra* note 9, at 67.

Compensation law, of the person for whom benefits are provided, to the extent of the benefits provided."[93] To the extent that these subrogation rights are enforced, the end result is that no-fault insurance is secondary and collateral sources are primary, and there is no double compensation.

Both Florida and Massachusetts take mixed approaches. Florida has retained the collateral source rule, thus permitting double compensation, except for workmen's compensation benefits. These latter benefits are primary and serve to reduce, but not necessarily eliminate, no-fault benefits payable.[94] In Massachusetts, persons entitled to workmen's compensation are excluded entirely from receiving no-fault benefits.[95] The collateral source rule is retained as to medical expenses, thus permitting double compensation, but as to "wage continuation plans," no-fault is secondary.[96]

It is interesting that none of the statutes attempt to prevent double compensation by making no-fault insurance primary and limiting compensation from collateral sources.

V. Residual Actions in Tort

All three of the statutes surveyed here retain the right to recover damages in tort for economic loss uncompensated for by no-fault benefits,[97] although it is perhaps more accurate in light of the statutory language to say that the defendant in a tort action is exempt from lia-

---

[93] Del. Code Ann. tit. 21, § 2118 (f) (Supp. 1971).

[94] Fla. Stat. Ann. § 627.736 (4) (1972).

[95] Mass. Gen. Laws Ann. ch. 90, § 34A (1972). Making workmen's compensation benefits exclusive is consistent with the resource allocation argument and does not result in the kind of unfairness which I have suggested results when collateral sources generally are made primary. It is appropriate to allocate the cost of work-related automobile accidents, along with the costs of other work-related injuries, to the employer. There is a slightly different result under the Florida statute, in which workmen's compensation is primary, but not exclusive. To the extent that no-fault insurance provides more benefits for a given injury than workmen's compensation, the cost is split between drivers and industry.

[96] *Id.* The statute does provide for a unique second look under which no-fault may be primary as to loss income. If a person injured in an automobile accident suffers, within a year after the date of the last no-fault benefit payment, a disabling accident or illness, but is not entitled to compensation under his wage continuation plan because it has been exhausted as a result of the automobile accident injury, he may recover as no-fault benefits up to the amount that such benefits were initially reduced because of benefits received under the wage continuation plan.

[97] Del. Code Ann. tit. 21, § 2118 (a) (4) (Supp. 1971); Fla. Stat. Ann. § 627.737 (1) (1972); Mass. Gen. Laws Ann. ch. 90, § 34M (1972).

bility to the extent that the plaintiff is entitled to no-fault benefits. But the statutes have different methods of calculating the exemption.

One method of calculating the exemption would be to simply subtract the amount of no-fault entitlement from the tort verdict which has been reached under the common law rules of damages. This seems to be the approach of the Florida statute, under which the defendant in a tort action "is hereby exempted from tort liability for damages" to the extent that no-fault benefits are payable.

The language in the Delaware statute is quite different. The plaintiff "is precluded from pleading or introducing into evidence in an action for damages against a tortfeasor those damages for which [no-fault benefits are] available . . . whether or not such benefits are actually recoverable."[98] This seems to mean that for the period during which the plaintiff is eligible for no-fault benefits, such benefits are exclusive and no tort damages can be recovered for that period. This approach could result in tort recovery lower than under the subtraction of benefits approach in two ways:

> (1) The general rule in a tort action is that the plaintiff is entitled to recover for impaired earning capacity; under no-fault, the measure is income actually lost. It is not unusual for a person's actual income to be temporarily less than his earning capacity. If no-fault is the exclusive remedy for the period during which the plaintiff is eligible for benefits, the excess of the value of the impaired earning capacity over lost income could not be recovered. If no-fault benefits are simply subtracted from the tort recovery, this difference would be recovered in tort. Furthermore, under all three statutes there is a built-in difference between the two measures. In Massachusetts the lost income benefit is limited to 75 percent of average weekly earnings, and in Delaware and Florida there is a reduction to the extent that the lost income would have been subject to income taxes.[99]
>
> (2) If collateral sources are primary and have been used to reduce or eliminate no-fault benefits, the amount represented by the collateral sources will not serve to reduce the tort recovery under the subtraction of benefits approach, since collateral sources can hardly be called no-fault benefits. But under the Delaware statute, a person may be "eligible for benefits"

---

[98] DEL. CODE ANN. tit. 21, § 2118 (g) (Supp. 1971).

[99] *See* MASS. GEN. LAWS ANN. ch. 90, § 34A (1972); Del. Dep't of Ins. Reg. 9, Art. IV (2) (Oct. 1, 1971); FLA. STAT. ANN. § 627.736 (1) (b) (1972).

even though they are not "actually recoverable" because of the presence of primary collateral sources. If this were the interpretation, there would be no recovery in tort for damages for which there has been collateral source compensation.

There is language in the Massachusetts statute that supports both approaches, although the Massachusetts Supreme Judicial Court in *Pinnick v. Cleary*,[100] by way of dictum and as part of a quick run-through of the Massachusetts statute, indicated that it read the statute as providing for the subtraction of benefits method.

A third method of calculating the tort exemption is offered in the Keeton-O'Connell Basic Protection Plan. Under that proposal, the tort exemption is the maximum amount of no-fault benefits payable.[101] This subtraction of the maximum benefits payable approach is obviously different from, and less generous than, the subtraction of the benefits actually payable approach of Florida. Under the Florida statute, the full difference between the benefits actually paid and tort damages are recoverable. Under the Keeton-O'Connell proposal, that difference is recoverable only to the extent that it exceeds the statutory maximum amount of benefits payable. But it would permit greater tort recovery than under the Delaware exclusive remedy approach, for under the Keeton-O'Connell plan the difference between the maximum no-fault benefits payable and tort damages for the period of time during which no-fault benefits are available is recoverable in tort; under the Delaware statute it is not.

If it is felt that within the maximum limit of benefits payable for economic loss, the no-fault benefits are adequate, the Delaware exclusive remedy approach would seem the most appropriate. If no-fault benefits are inadequate during the time that they are available, it would make more sense to raise them to an adequate level rather than to rely on the somewhat discredited tort action as a supplement.

Another important difference between the Delaware and Florida statutes relates to persons to whom the exemption is available. Under the Delaware statute, if the action is brought by the injured person, the exemption is available to all defendants, whether no-fault insureds or not. Indeed, it is available to the manufacturer or supplier of a motor vehicle if the plaintiff's cause of action is in tort. The exemption is not complete, however, for it does not serve to bar an insurer claiming through its subrogation rights to the extent that it has actually paid no-fault benefits.[102]

---

[100] 271 N.E.2d 592, 602 (Mass. 1971).

[101] R. KEETON & J. O'CONNELL, *supra* note 2, at 323.

[102] DEL. CODE ANN. tit. 21, § 2118(f) (Supp. 1971).

Under the Florida statute, the exemption is available only to no-fault insureds. This, it seems to me, makes more sense. If no-fault insurance is viewed as a partial displacement of the tort system of loss allocation, then the tort exemption is a part of the trade-off of the common law rights and liabilities for the benefits of no-fault. It is odd that a person otherwise a stranger to the trade-off can take advantage of the tort exemption. Double compensation can be prevented by compelling the plaintiff to reimburse the no-fault insurer out of the tort recovery to the extent that he has actually received no-fault benefits.

Under all three statutes discussed here, the tort exemption is unaffected by any applicable deductible – that is, the exemption is calculated as if the plaintiff had actually received benefits he did not receive because of a deductible. This treatment of the deductible is objectionable because it reinforces the "no-fault takes care of them that takes care of themselves" attitude manifested by the deductible itself. Since a person who elects a deductible cannot, up to the limit of the deductible, recover no-fault benefits, either under his own policy or in tort, the practical effect is that as to insureds and members of their households, insurance is purely voluntary within the limit of the deductible. As already indicated,[103] no-fault insurance thus adds up to nothing more than the abolition of the common law action in tort within the limit of the maximum deductible[104] available, since accident insurance, even insurance limited to automobile accidents, providing medical expense and lost income protection is generally available apart from no-fault plans. If the availability of self-insurance for economic loss leads to the conclusion that there should be no tort recovery, it follows that tort recovery should be abolished entirely. But if such availability is not a sufficient reason to abolish the common law right to recover for economic loss, then the election of a deductible should have no impact on tort recovery. It is worth emphasizing again that a deductible of any substantial amount has no place in a no-fault statute.

In addition to this basic objection, the calculation of the tort exemption as if benefits not received were received has a particularly bad side effect under the Florida and Massachusetts statutes in that it discriminates against the poor. Under the Massachusetts statute, for example, the defendant is exempt from tort liability "to the extent that the injured party is, or would be had he or someone for him not pur-

---

[103]*See* pp. 97-98 *supra*.

[104]In Massachusetts, within the maximum limit of no-fault benefits payable, since a deductible may be elected up to that limit.

chased a deductible . . . , entitled to recover . . . personal injury protection benefits. . . ."[105] If an injured person had opted for a deductible because his collateral sources were adequate, and thus had little to gain from no-fault insurance, the deductible would not reduce his tort recovery to the extent that he received compensation from collateral sources, for the amounts represented by the collateral sources could not have been recovered as no-fault benefits even if there had been no deductible. Thus, he could recover the amounts represented by collateral source payments twice: once from the collateral sources and again in the tort action. But if he opted for a deductible from the need to save money and did not have collateral source backup, he would not be able to recover even once in tort, for in this case it would have been the deductible that caused the non-payment of benefits. This discriminatory effect could be avoided by providing for the reduction of tort recovery by the amount of the applicable deductible, whether or not the deductible has resulted in a reduction in no-fault benefits.[106]

---

[105]MASS. GEN. LAWS ANN. ch. 90, § 34M (1972).

[106]This discriminatory effect could also be avoided were the Massachusetts courts to borrow, in interpreting this section, the law relating to joint causes from the law of torts. Under this law, if two independent forces, each sufficient to cause the harm ultimately inflicted upon the plaintiff, join and together cause the harm, each force is treated as if it were the cause of the harm. The classic case applying this rule of causation is Kingston v. Chicago & N.W. Ry., 191 Wis. 610, 211 N.W. 913 (1927), in which a fire started by the defendant joined with another fire. The two fires combined, then spread to and destroyed the plaintiff's property. The court refused to accept the defendant's argument that the plaintiff's property would have been destroyed by the other fire, eliminating defendant's fire as a cause. By analogy, the Massachusetts courts might treat a deductible and collateral source as joint causes, each sufficient to result in a denial of no-fault benefits. Thus, the court could conclude that the deductible did "cause" a denial of benefits and calculate the tort exemption accordingly. It would, of course, be better to avoid this problem of interpretation by proper legislative draftsmanship.

The joint cause analogy might also appeal to the Massachusetts courts as a way of avoiding another embarrassing feature of the Massachusetts tort exemption. Under section 34A of the Massachusetts statute, unauthorized operators and passengers are not entitled to no-fault benefits, and no exception is made for members of the insured's household. If a member of the insured's household used the insured automobile without authority and were injured, he would be denied no-fault benefits for that reason, but would not be barred from full tort recovery even if the insured had opted for a deductible, which under the statute is applicable to members of his household. But an authorized operator or passenger who is a member of the insured's household would be barred by the tort exemption to the limit of the deductible. Thus a member of the insured's household whose use of the insured automobile is unauthorized would have greater rights in a tort suit than another member whose use is authorized. This unseemly result could be avoided by viewing unauthorized use and the deductible as joint causes, or better still by better draftsmanship.

Under the Delaware statute, this impact is avoided by the exclusive remedy method of calculating the tort exemption.

Certainly the most controversial feature of many of the no-fault proposals has been the limitation on the common law right to recover for pain and suffering. The origins of recovery for pain and suffering in negligence actions are lost in the mists of history, but so long as a negligence action is looked at primarily as a private fight between an innocent plaintiff and a wrongdoing defendant, compensation for this intangible but nonetheless real element is appropriate. But as we move more toward economic justifications for accident law, the reasons supporting recovery for pain and suffering, since it does not involve economic loss, are less persuasive. The arguments for[107] and against[108] pain and suffering recovery have been made elsewhere and need not be repeated here. It is enough to note that on this issue, the realities of the political process are likely to dominate, and intellectualizing about it may not be the most fruitful of pastimes.

Of the three statutes discussed here, only Delaware does not restrict the common law right to recover damages for pain and suffering. Both Florida[109] and Massachusetts[110] limit the right to recover in tort for this element, although there are important differences between the two as to detail.

In both statutes, the limitation is geared to the nature of the injury. In Massachusetts, to recover in tort for pain and suffering the accident must have resulted in death, loss of a body member, permanent or serious disfigurement, loss of sight or hearing, or at least $500 in medical expenses. The Florida statute is substantially the same except the required medical expense must be $1,000.

The obvious purpose of this approach is to eliminate claims for relatively less severe pain and suffering, but it does so in a crude fashion. Linking pain and suffering recovery to medical expense is particularly bound to produce uneven results. There can be much variation in the cost of treating similar injuries. Hospital rates and doctors' fees are not uniform throughout a state,[111] and different doctors may prescribe

---

[107]G. CALABRESI, *supra* note 54. *See* almost any issue of *Trial Magazine* for the last 4 to 5 years.

[108]R. KEETON & J. O'CONNELL, *supra* note 2, at 358-62; AUTOMOBILE INSURANCE, *supra* note 9, at 25-29.

[109]FLA. STAT. ANN. § 627.737 (2) (1972).

[110]MASS. GEN. LAWS ANN. ch. 231, § 6D (1972).

[111]*See* Grace v. Howlett, Cir. Ct. of Cook City, Ill. (1971), *reproduced at* 8 TRIAL MAGAZINE 10, 13: "As the record shows, medical expenses for treatment of the same injury differ greatly among various regions and communities of the state;

different courses of treatment involving differing levels of cost for substantially similar injuries.

This approach also has large potential for fraud. As legitimate medical expenses approach the threshold, there will certainly be the temptation to incur the last dollars necessary to exceed the limit, whether such expenditures are necessary or not. While the requirement that compensable medical expenses must be reasonable will give the trial court some control, the closer the legitimate expense gets to the threshold, the more difficult it will be to prove the additional amount unreasonable. Whether or not making pain and suffering recovery hinge on the amount of medical expense is constitutional,[112] it does seem unfair.

A more sound approach is that suggested by Keeton and O'Connell in their Basic Protection Plan under which there can be no recovery for the first $5,000 of pain and suffering.[113] There may be some risk under this approach that injured persons will exaggerate claims for pain and suffering in the hopes of chiseling a few dollars out of insurance companies. But this can be kept at an acceptable level by a threshold near that suggested by Keeton and O'Connell, a hardnosed attitude by insurance companies, and strong control by trial judges of which cases get to the jury. In any event, the potential for abuse is no greater, and is probably less, than under the limitation based on medical expenses, and the unevenness of that approach is largely avoided.

One of the peculiarities of the Massachusetts statute is that the limitation on pain and suffering recovery is not geared to entitlement to no-fault benefits. It applies to all actions in tort "arising out of the ownership, operation, maintenance or use of a motor vehicle within this commonwealth by the defendant."[114] One effect of this is that the defendant need not be a no-fault insured to be entitled to the benefit

---

hospital rates for semi-private rooms range from $13.00 to $115.00 per day; physicians charges also vary considerably from one area of the state to another and from one neighborhood to another in the same city."

[112]Constitutional: Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971); unconstitutional: Grace v. Howlett, Cir. Ct. of Cook City, Ill. (1971), *aff'd on other grounds*, 5 Ill. 2d 478, 283 N.E.2d 474 (1972). Under the Illinois statute, pain and suffering recovery was limited to 50 percent of the medical expenses up to $500 of such expense, and to 100 percent of medical expenses for expenses above $500. This is the approach used in section 9(a) of H.R. 175, Miss. Legis., 1972 Sess. It is subject to the same criticism of unfairness as the Massachusetts and Florida statutes. There will also be some temptation to pad medical expenses if the injured person decides to pursue a pain and suffering claim — every dollar spent carries an automatic increment if there is recovery.

[113]R. KEETON & J. O'CONNELL, *supra* note 2, at 323.

[114]MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1972).

of the limitation. Thus the Vermont driver involved in a Massachusetts accident is entitled to the pain and suffering exemption, even though he is not entitled to the economic loss tort exemption discussed earlier.[115] The earlier comments made in connection with the economic loss tort exemption are fully applicable here. In the absence of legislation limiting pain and suffering recovery in all kinds of actions, the limitation appears to be an integral part of the no-fault scheme. There is no more reason for making this limitation available to non-no-fault insureds than there is for making the economic loss tort exemption available to them.[116]

If this gratuitous benefit bestowed by the Massachusetts statute on persons who are not parties to the no-fault trade-off is unwise, the application of the pain and suffering limitation to plaintiffs excluded by the statute as no-fault beneficiaries is positively unfair. As already indicated, there can be many persons injured in automobile accidents who are not entitled to no-fault benefits — for example, a pedestrian not struck physically by the automobile or a non-no-fault insured struck by a motor vehicle which is not covered by a no-fault policy. Yet under the Massachusetts statute, the limitation on pain and suffering recovery applies fully to them. It may be good policy to require those entitled to no-fault benefits to give up pain and suffering recovery in cases of less serious injury in exchange for the certainty of no-fault benefits; but to require automobile victims who are excluded by the statute as no-fault beneficiaries to give up the full right to recover for pain and suffering in exchange for nothing at all is unjust on its face. It was just such an effect that in part led the Supreme Court of Illinois to strike down as unconstitutional the Illinois no-fault law.[117]

---

[115]Although the Massachusetts plaintiff might sue the Vermont driver in Vermont, the court of that state might well apply the Massachusetts limitation, under its applicable conflicts of laws rules, since the Massachusetts statute does not purport to make the limitation apply only to actions brought in Massachusetts.

[116]Mississippi House bill 175 is even worse on this score than the Massachusetts statute. Under section 9, the pain and suffering recovery limitation applies to actions in tort for injuries "arising out of the operation, ownership, maintenance or use of a motor vehicle within this state," with no requirement that the operation, etc., be by the defendant. Thus, the limitation is available to manufacturers and suppliers of products if the plaintiff's action is in negligence, but not if the action is for breach of warranty, although the distinction may change if Mississippi moves, as have many states, to strict liability in tort. While I have not made a word-for-word comparison, Mississippi House bill 175 appears to be the same as the Illinois no-fault statute, which was recently struck down as unconstitutional by the Illinois Supreme Court. MASS. GEN. LAWS ANN. ch. 231, § 6D (1972). Apart from its unconstitutionality in Illinois, it is not a very good example for the Mississippi Legislature to follow.

[117]MASS. GEN. LAWS ANN. ch. 231, § 6D (1972).

Under the Florida statute, the pain and suffering recovery exemption is available only to owners and operators of no-fault insured vehicles; but it appears to be available to them in all cases, whether the plaintiff is entitled to no-fault benefits or not, thus incorporating the same unfairness, and perhaps the unconstitutionality, of the Massachusetts statute.

VI. Conclusion

Within a reasonable amount of space for an article in a law review symposium of this kind, I have pointed out some of the alternatives available once the decision to adopt a no-fault plan is made. Because of the limitations of space, I have not covered all of the choices that must be faced up to and resolved. Important topics, among many, which have been left largely untouched are the procedures for enforcing claims, property damage coverage, assigned claims plans, and constitutionality. What I have covered was chosen because of a combination of what I consider most elemental, most important, and most interesting to me. Nor have I said all that might be said about the topics that I have covered, for that would have reduced what I could deal with here even more.

Apart from omitting matters which will be of vital legislative concern, approaching no-fault topic-by-topic rather than statute-by-statute makes it considerably more difficult to see the statutes I have dealt with here as integrated wholes. But a statute-by-statute analysis would have been cumbersome, and there would have been the temptation to bog down in the problems of interpretation[118] and internal inconsistencies, at the sacrifice of discusssion of the larger policy issues. This is particularly true of the Massachusetts statute, which would finish high on anyone's list of the ten worst-drafted statutes of the year.

Finally, lest my almost single-minded concern with policy be taken for political naiveté, I do realize that any plan must be politically palatable to the legislature considering it. What suits Massachusetts'

---

[118]It is, of course, impossible to avoid problems of interpretation even in an article like this. When faced with such problems, I often resolved them without discussion by selecting what *the* most likely, or at least *a* likely, interpretation would be. I have no doubt that my assumptions about the meaning will not be uniformly followed in the courts. Apart from the small blow to my pride for being wrong in public, no harm will have been done, since I have been concerned in this article with policy issues and not the intricacies of legislative draftsmanship. I have used the three statutes for comparative purposes, and the validity of my remarks is not affected by the ultimate content given these statutes in the interpretative processes.

tastes may be quite different from that which would satisfy Mississippi legislative gourmets. And to the extent that policy is important, the give and take of the legislative process will make rare a piece of legislation that represents a single policy, or a set of entirely consistent policies. But whatever the proper mix of policy and politics, the people will be better served if the choices are made in light of the policies at stake.

THE UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT

*Roger C. Henderson**

The National Conference of Commissioners on Uniform State Laws at its Annual Meeting in August 1972 approved the Uniform Motor Vehicle Accident Reparations Act and recommended that it be enacted in all of the states. This action was the culmination of efforts toward drafing a uniform act, the initial consideration of which began in 1970,[1] dealing with compensation of victims of automobile accidents. The Act creates a complete system of reparations for injuries arising from the ownership, maintenance, or use of motor vehicles. Economic losses from motor vehicle accidents, for the most part, would be compensated without regard to fault through first party insurance coverages, and tort liability for those losses would be abolished. Tort liability for general damages would be abolished except in those cases involving severe pain and suffering. The purpose of this article is to summarize the main provisions of the Act so that the reader will have a basic view of how it works. For those desiring to know the intricacies, there is no substitute for studying the Act and Comments which accompany it.[2]

I. Mandatory First Party Benefits

A. Basic Reparation Benefits

Basic reparation benefits are the minimum benefits which, with few exceptions, are provided without regard to fault for all persons injured

---

*Professor of Law, University of Nebraska. B.B.A. 1960, LL.B. 1965, University of Texas; LL.M. 1969, Harvard University. The author and Professor William Cohen, Stanford University School of Law, were the Reporter-Draftsmen for the Uniform Motor Vehicle Accident Reparations Act. To a large degree, this article is taken from the Comments which were drafted for the Uniform Act. Also, in conformity with the Comments, the word "State" has been capitalized throughout this article when referring to a state enacting the Uniform Act.

[1]*See* National Conference of Commissioners on Uniform State Laws, Report of the Subcommittee on Scope and Program, 1970 Handbook 75. The special committee which drafted the Act was created in the spring of 1971.

[2]A copy of the Uniform Motor Vehicle Accident Reparations Act [hereinafter cited as UMVARA] may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago, Illinois 60637.

and the dependent survivors of persons killed in motor vehicle[3] accidents. Basic reparation benefits cover loss from bodily harm, sickness, disease, or death, but do not include benefits for harm to property. The concept of "loss" is the basic starting point in calculating basic reparation benefits. Loss is defined in a sense which is limited to economic detriment and includes accrued loss only.[4] Noneconomic detriment is not loss, but economic detriment is loss, although caused by pain and suffering or physical impairment. Loss is defined as having five components: allowable expense, work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss.

"Allowable expense" is a broad term covering products, services, and accommodations such as those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care. The definition includes charges for remedial treatment and care rendered in accordance with a religious method of healing. Allowable expense, however, is restricted to charges that are reasonable in amount for products, services, and accommodations which are reasonably needed by the injured person.[5] Two specific limitations are contained in the general definition. One is that, unless intensive care is medically required, coverage for a hospital room is limited to a reasonable and customary charge for semi-private accommodations. This limitation applies only to the cost of an ordinary hospital room and is inapplicable to charges for use of such hospital facilities as surgery and recovery rooms. The second limits total charges for funeral, cremation, and burial to $500, including charges for casket and undertaker's services and other charges such as those for flowers, burial vault or cemetary plot, and honoraria for clergy or fees of musicians.

"Work loss" covers only actual loss of earnings, as contrasted to loss of earning capacity, and expenses reasonably incurred by the injured person in obtaining services in lieu of those he would have

---

[3]"Motor vehicle" is defined to mean "(i) a vehicle of a kind required to be registered under [the laws of this State related to motor vehicles] or (ii) a vehicle, including a trailer, designed for operation upon a public roadway by other than muscular power, except a vehicle used exclusively upon stationary rails or tracks. 'Public roadway' means a way open to the use of the public for purposes of automobile travel." UMVARA § 1 (a) (7).

[4]One of the basic tenents of the Act is that, ordinarily, basic reparation benefits are payable as economic loss accrues in contrast to the customary practice of paying tort claims in lump-sum settlements or judgments. *Id.* § 23. Lump-sum settlements and judgments are permitted in limited circumstances. *Id.* §§ 26-27.

[5]The requirement that services be reasonably needed is further defined, in the case of rehabilitation programs, in the provision on rehabilitation treatment and occupational training. *Id.* § 34 (a).

performed for income, reduced by any income from substitute work actually performed by him or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake. Thus, an unemployed person suffers no work loss from injury until the time he would have been employed but for his injury. On the other hand, an employed person who loses time from work he would have performed had he not been injured has suffered work loss, even if his employer continues his wages under a formal wage continuation plan or as a gratuity. Employer payments in this situation are collateral source payments rather than wages since they are not payments for work done during the time the employee was absent. Work loss is not restricted to the injured person's wage level at the time of injury. For example, an unemployed college student who was permanently disabled could claim loss, at an appropriate time after the injury, for work he would then be performing had he not been injured. Conversely, an employed person's claim for work loss would be appropriately adjusted at the time he would have retired from his employment. Work loss includes not only lost wages but lost profit which is attributable to personal effort in self employment, as distinguished from profit attributable to investment or the cost of hiring a substitute to perform self employment services. Finally, the definition contains an explicit reference to the doctrine of avoidable consequences: work loss is computed by subtracting not only income from work which the injured person undertook in lieu of that which his injury prevented him from performing but also income which he might have earned in available appropriate substitute work. As under the common law doctrine of avoidable consequences, the issue is whether claimed work loss is justly attributable to the injury. Subtraction of potential income from ultimate work which the injured person declined is proper only where, under all circumstances, the ultimate work is appropriate and the injured person's refusal to undertake the work is unreasonable.

"Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured. For example, a housewife whose injury prevented her from performing services in the home could not attribute loss to the incapacity itself, but loss would be suffered if domestic help were hired to perform those services.

"Survivor's economic loss" and "survivor's replacement services loss" are defined in a way analagous to standards for damages for wrongful death, except that, as is the case for work loss and replacement services

loss, allowable items are more rigorously limited to genuine economic loss. As under typical wrongful death statutes, the measure of damages is loss to the survivors which results from death. Thus, in calculating benefits, the decedent's probable life expectancy had he not been injured and the extent to which the survivors would have received contributions of things of economic value or the extent to which the decedent would have performed services for his survivors must be taken into account. It is also necessary to subtract expenses which the survivors avoided by reason of the decedent's death, although the same avoided expenses cannot be subtracted twice from both survivor's economic loss and survivor's replacement services loss. For example, in the case of death of a child who had regularly contributed small personal earnings to his family and performed services in the home, there might be no survivor's economic loss or survivor's replacement services loss after the expenses avoided by reason of his death were subtracted from the value of the earnings and the cost of replacement services he would have contributed to the family.[6]

Basic reparation benefits for allowable expense are unlimited in time or amount, as long as they meet the requirements of being reasonable charges for reasonably needed items of allowable expense. There is, however, a $200 aggregate limit during any calendar week on the amount of basic reparation benefits that can be recovered for injury to one person as compensation for work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss.

B. Calculation of Basic Reparation Benefits

As stated earlier, the concept of "loss" is the starting point in calculating basic reparation benefits. Basic reparation benefits, however, reimburse only "net loss." The concept of net loss is one of several devices in the Act providing for coordination of basic reparation benefits with benefits received from other sources for the same injury.[7] In

---

[6]"Survivor" is defined to mean "a person identified in [the statute of this State concerning liability for wrongful death] as one entitled to receive benefits by reason of the death of another person." *Id.* § 1 (a) (12).

[7]Other provisions of UMVARA providing for co-ordination of basic reparation benefits and collateral sources of benefits are: section 6 dealing with a reparation obligor's right of subrogation to the injured person's tort claims; section 14 which authorizes reparation obligors to offer an insured the option of designating other sources of benefits as primary, thereby making reparation benefits secondary; and section 18 which subjects certain claimants receiving benefits through the assigned claims plan to collateral source deductions in addition to those taken into consideration in calculating net loss.

calculating net loss for the purpose of determining basic reparation benefits due, one must subtract those benefits or advantages he is entitled to receive from social security, workmen's compensation, and state-required temporary, nonoccupational disability insurance. Social security includes all benefits under the Social Security Act, including Medicare and disability benefits. It does not include benefits provided under Title XIX of the Social Security Act (Medicaid) which are not paid through the Social Security system. The reference to workmen's compensation includes recoveries under similar plans voluntarily undertaken by an employer with no statutory obligation to do so, but excludes recoveries under laws where the recoveries are keyed to a finding of employer fault, such as the Federal Employers' Liability Act. At present, there are only six jurisdictions that have state-required temporary, nonoccupational disability insurance: California, Hawaii, New Jersey, New York, Puerto Rico, and Rhode Island.

Persons receiving basic reparation benefits through the assigned claims plan, except in cases involving insolvency of reparation insurers, are subject to additional collateral source subtractions in the calculation of net loss in addition to those mentioned above. All benefits or advantages such a person receives or is entitled to receive as a result of the injury, other than by way of succession at death, death benefits from life insurance, or in discharge of familial obligations of support, are subtracted in calculating net loss.

The income tax savings that is attributable to loss of income because of injury is also subtracted in calculating net loss. The subtraction may not exceed 15 percent of the loss of income and will be in a lesser amount if the claimant furnishes to the insurer reasonable proof of a lower value of the income tax advantage. This provision is necessary because basic reparation benefits, social security benefits, workmen's compensation payments, and temporary, nonoccupational disability benefits are not subject to income taxation under the Internal Revenue Code. Without this provision, an injured person would receive in basic reparation benefits and deductible collateral source payments an amount in excess of his usual take-home pay because he would not be taxed on any of this. To avoid administrative costs and delay in payment of claims, which might be necessary if the exact income tax consequences were calculated for each claimant, there is a presumption that the value of the tax advantage is 15 percent of the loss of income. In order to preclude unfair application of this provision to a low income claimant, the presumption is rebuttable by proof offered by a claimant of a lesser value of the tax advantage to him. In no event may the subtraction exceed 15 percent of the loss of income.

All replacement services lost on the date of injury and the first 7 days thereafter are also excluded in calculating basic reparation benefits. This provision does not concern collateral sources, but is a customary form of deductible found in insurance plans, particularly workmen's compensation and disability insurance, and is employed to avoid the relatively high cost to the system of handling the small claim. Since replacement services loss is also the type of loss that can be and usually is absorbed by relatives and friends for short periods after injury, it also serves the purpose of a co-insurance factor by requiring that the insured bear this cost for the first week after injury.

C. Optional Deductibles and Exclusions

Basic reparation insurers are required to offer to the insured, at appropriate reduced premiums, a number of optional deductibles and exclusions. The deductibles and exclusions, if elected, apply only to basic reparation insureds[8] under the policy and, in case of death of a basic reparation insured, his survivors.

The first deductibles required to be offered apply to basic reparation benefits otherwise payable and give the insured a choice of $100, $300, and $500 deductibles. These are aggregate deductibles per accident. For example, if a husband, wife, and two children were injured in a single motor vehicle accident and all were basic reparation insureds under a single policy, the deductible would not be subtracted from each of their claims, but would be subtracted only once from the total amount of benefits due. Basic reparation insurers are also required to offer a deductible dealing with the motorcyclist, who presents a high risk to an insurer since his exposure to bodily injury is so great. This permits some reduction from the premium which would be charged if insurers were required to write basic reparation coverage for two wheel motor vehicles without offering a special deductible. The deductible allows a motorcyclist to forego the first $1000 of reparation benefits, regardless of kind.

Basic reparation insurers are required to offer two types of optional exclusions: (1) 10 percent of all work loss and survivor's economic loss;

---

[8]"Basic reparation insured" is defined to mean "(i) a person identified by name as an insured in a contract of basic reparation insurance complying with this Act (Section 7(d)); and (ii) while residing in the same household with a named insured, the following persons not identified by name as an insured in any other contract of basic reparation insurance complying with this Act: a spouse or other relative of a named insured; and a minor in the custody of a named insured or of a relative residing in the same household with a named insured. A person resides in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere." UMVARA § 1(a)(3).

and (2) all replacement services loss and survivor's replacement services loss. Basic reparation insurers are also authorized to offer two other types of exclusions: (1) exclusions for a part of replacement services loss or survivor's replacement services loss, in addition to the full exclusion of such losses which must be offered as stated above; and (2) a contingent exclusion of benefits actually received from other specified sources of benefits. For some persons, the last optional exclusion mentioned may present the most significant cost reduction opportunity in the purchase of a mandatory basic reparation policy. The provision permits, but does not require, a reparation insurer to offer an exclusion from basic reparation benefits of loss otherwise compensated by benefits received from other specified sources of benefits which are approved by the insurance commissioner as meeting certain standards. This is another provision in the Act which attempts to deal with the coordination of benefits from collateral sources by giving the insured an opportunity to avoid duplication of benefits and the consequent duplication of premium payments.

While both deductibles and exclusions are designed to reduce premium costs by reducing benefits payable, it is significant that exclusions are subtracted from loss in calculating net loss, while deductibles are subtracted from basic reparation benefits otherwise payable. The most significant impact is upon the $200 standard weekly limit mentioned earlier.[9] Suppose, for example, a wage-earner whose only loss was wage loss for two weeks of work, and after subtracting income tax benefits, his net loss was $300 for each week. His maximum basic reparation recovery for wage loss would be $200 for each week. If his claim were subject to the 10 percent exclusion, his net loss would still exceed $200 and his basic reparation benefits payable would be unaffected. On the other hand, if his claim were also subject to a $100 deductible, which is deducted from benefits otherwise payable, his basic reparation benefits would be reduced by $100 and, assuming no other loss, for the first week he could recover only $100 in benefits.

D. Denial or Restriction of Benefits to Certain Persons

While basic reparation benefits are normally payable without reference to fault, there are two limited exceptions to that principle. An injured person whose injury stems from acts intended to injure himself or another is disqualified from receiving the benefits from any source, including the assigned claims plan. Since survivors should not be punished for the decedent's wrongdoing, particularly as to benefits

---

[9] *See* p. 110 *supra*.

normally paid without reference to fault, survivor's benefits are not denied merely because the decedent intended to injure another person. However, to preclude the possible inducement to suicide in an automobile collision, survivor's benefits are denied if the decedent intended to injure himself. In order to be disqualified from receipt of benefits, a person must intend injury, which is defined as "bodily harm, sickness, disease, or death."[10] Thus, one who has merely intended to frighten another is not disqualified from receipt of benefits. Nor is he disqualified merely because his conduct created great risk of injury, because he knew his acts were negligent or reckless, or because he intended the act which resulted in injury. The disqualification is also inapplicable where the claimant acted in self-defense or in defense of a third person, whether such self-defense or defense of a third person is reasonable or not. Consistent with the general policy of the Act to pay benefits without reference to fault, it would be inappropriate to deny benefits to these persons who had acted in good faith, although they had acted negligently.

The second exception to the fault principle is limited to converters who are not basic reparation insureds. An intentional converter of a motor vehicle and, in the event of his death, his survivors are excluded from all benefits for losses arising from use of the converted vehicle, except under an insurance policy under which he is a basic reparation insured. A converter who is a basic reparation insured will collect benefits under his family policy without reference to the vehicle he occupied at the time of injury, as the Act does not operate to deny benefits for which he or his family have paid. There is one exception to this disqualification. A converter under 15 years of age who is not a basic reparation insured may recover from the assigned claims plan. A person is not a converter if he uses the motor vehicle in the good faith belief that he is legally entitled to do so.

In addition, the Act restricts benefits in one other situation that has no relation to fault concepts under tort law. A person who has a legal responsibility, usually an owner, to maintain the security required under the Act providing the mandatory first party benefits and who fails to do so is denied basic reparation benefits which would otherwise be due from the assigned claims plan to the extent of $500 for each year of continuous noncompliance, and is subject to all the optional exclusions and deductibles mentioned earlier.[11]

---

[10]UMVARA § 1 (a) (4).

[11]*See* p. 112 *supra*.

E. Source of Basic Reparation Benefits

The underlying principle of the Act in regard to the source of basic reparation benefits is that, insofar as possible, a person suffering loss should make his claim for basic reparation benefits against his own reparation obligor.[12] This principle, however, cannot be strictly adhered to because not all persons suffering loss will be basic reparation insureds. If the person injured is not a basic reparation insured but is an occupant of a vehicle, he receives benefits from the security covering the vehicle. Pedestrians and other persons not occupying a motor vehicle, who are injured in motor vehicle accidents, but who are not basic reparation insureds, may claim against the security covering any involved vehicle.

There are two exceptions to the principle that each person claims against his own reparation obligor, for the purpose of requiring the owners of certain vehicles to bear the cost of injury to occupants. First, when a motor vehicle is used in the business of transporting persons or property, the insurer of that vehicle is responsible for all claims arising from injury to its occupants while it is so used. Thus, a passenger in a bus or taxi cab will look to the security covering the vehicle. Second, if an employer furnishes a motor vehicle to an employee, the security covering that vehicle is responsible for claims arising from injury to the employee, his spouse, or other relative residing in the same household while driving or occupying the vehicle. This is so whether or not the employee is acting within the course of his employment at the time he is injured.

Where the person required to maintain security has not done so, or where the insurer is insolvent, the injured person may collect basic reparation benefits from the assigned claims plan. Thus, a pedestrian who is not a basic reparation insured, injured by an uninsured vehicle, will not be denied benefits. However, if a person is a basic reparation insured under a policy issued by a solvent insurer, he is not required in any case to prosecute his claim under the assigned claims plan. An occupant of a motor vehicle being used in the business of transporting persons or property, and an employee occupying an employer-furnished vehicle, are entitled to benefits under their own basic reparation policies if the vehicle is uninsured.

---

[12]"Reparation obligor" is defined to mean "an insurer, self-insurer, or obligated government providing basic or added reparation benefits under this Act." UMVARA § 1 (a) (11).

II. Tort Exemptions and Retained Tort Liabilities

Tort liability with respect to accidents occurring in the enacting State and arising from the ownership, maintenance or use of a motor vehicle is abolished except in certain specific cases. Before proceeding to the exceptions, it should be emphasized that the only tort actions that are abolished are those which arise from the ownership, maintenance, or use of motor vehicles. Among those tort actions thus unaffected by this general abolition provision would be those against an automobile manufacturer for products liability, against a railroad in the case of an automobile-train collision, and against a highway contractor for failing to provide adequate warning signs. This general abolition is designed to eliminate the bulk of tort claims for personal injury arising from automobile accidents. Economic loss from personal injury is compensated by basic reparation benefits payable to automobile accident victims without regard to fault. Savings from the elimination of controversies over fault and the abolition of actions for less-than-severe pain and suffering will be used to pay for the extensive benefits provided under basic reparation insurance.

There are seven specific exceptions to the general principle abolishing tort actions arising from the ownership, maintenance, or use of a motor vehicle. The Act does not abolish the liability:

(1) of an owner, including a government, who has not provided security for payment of basic reparation benefits and tort judgments as provided by the Act;

(2) of a person in the business of repairing, servicing, or otherwise maintaining motor vehicles arising from a defect in a motor vehicle caused or not corrected by an act or omission in repair, servicing, or other maintenance of a vehicle in the course of his business;

(3) of a person for intentionally caused harm to person or property;

(4) of a person for harm to property other than a motor vehicle and its contents;

(5) of a person in the business of parking or storing motor vehicles arising in the course of that business for harm to a motor vehicle and its contents;

(6) for damages for work loss, replacement services loss, and survivor's loss of support and services uncompensated by basic reparation benefits by reason of the standard weekly limit of $200 on such losses, but only if the injured person dies or is disabled for more than 6 months; and

(7) for damages for noneconomic detriment (i.e., pain and suffering, but not punitive damages) in excess of a statutory figure, the suggested amount being $5000, if there is death, significant permanent injury, serious permanent disfigurement, or more than 6 months of total disability.

In the case of all the exceptions, the Act creates no new tort liabilities, but merely retains the tort liability described to the extent that it exists under relevant law. For example, if the State of enactment permits survival of a decendent's claim for relief for conscious pain and suffering prior to death, the seventh exception preserves that claim subject to the suggested $5,000 exemption. On the other hand, if no claim for relief survives under relevant law, the seventh exception creates no claim for the decedent's pain and suffering prior to death. Moreover, the Act limits the application of the general tort abolition to liability arising from motor vehicle accidents within the enacting State. The victim of an out-of-State automobile accident would be entitled to whatever tort remedy is allowed him by the state where the accident occurred, even if he is also entitled to basic reparation benefits.

The rationale for denying the tort exemption to persons failing to comply with the requirement of providing security is that such persons have not contributed to the payment of basic reparation benefits which are intended to replace much of existing tort liability. For example, the State is not empowered to require that the United States government post security for the payment of basic reparation benefits. The United States' obligation to pay the victims of accidents involving government motor vehicles is limited to paying "tort claims, in the same manner, and to the same extent as a private individual under like circumstances."[13] Under the provisions on security covering the vehicle, the United States Government may elect to provide security for its vehicles. If the United States provides security, it would be exempt from tort liability. But, under the first exception, if it elected not to do so, it would continue to be liable in tort "to the same extent as a private individual" who had not complied with the security requirement. This exception retains tort liability only for the owner of the unsecured vehicle, since, under the provisions of security covering the vehicle,[14] only the owner is required to furnish such security. The driver of an unsecured vehicle who is not the owner is not liable in tort under the tort action retained by the first exception. The owner's vicarious liability under owner-consent statutes or principles of the

[13]Federal Tort Claims Act, 28 U.S.C. § 2674 (1970).

[14]UMVARA § 7.

law of agency is retained, however, as if the driver's tort liability had been retained as well.

The second exception, in regard to repair facilities, is intended to alleviate an anomaly which would otherwise arise from the definition of "maintenance or use of a motor vehicle" in the Act.[15] Under that definition conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles is included only if the conduct occurs off the business premises. The primary purpose of that provision is to disallow basic reparation benefits to a person injured by automobile maintenance activities in a motor vehicle service garage, while allowing benefits to persons injured by such conduct as road testing the vehicle on a highway. A subsidiary purpose of the definition is to retain tort liability if a person is injured on the highway or there is harm to property as a result of negligent repair. The second exception assures that the availability of tort recovery to a person who is injured on the highway or whose vehicle is damaged as a result of a faulty repair will not depend on whether the repair took place on or off the business premises of the mechanic.

The retained tort action for intentionally caused harm encompasses, among others, traditional liability for assault and battery.

The retained tort action for harm to property provided by the fourth exception leaves harm to property other than a motor vehicle and its contents to the existing tort liability system. The exception within the exception works to abolish tort liability for motor vehicles and their contents. By eliminating tort claims for vehicle damage, a state will affect lower total insurance costs for vehiclar damage. As in the case where the issue of fault is eliminated in compensating persons for bodily injury, total insurance costs will be reduced because there can be no quarrel over culpability and no administrative expense in assigning ultimate responsibility. This aspect of savings for vehicle damage will not equal the percentage savings in the bodily injury area because there is no equivalent to the savings in the bodily injury area from the elimination of all but the most severe claims for pain and suffering. Savings will result, however, from a motorist's having to carry only one coverage applicable to vehicle damage, an optional collision coverage on his own car, where as under the present system two coverages are commonly carried, collision, a non-fault coverage, and property damage liability, a fault coverage. Where a motorist chooses not to insure his own vehicle, his premium for property damage will reflect only his exposure to out-of-State accident liability and liability to

---

[15] *Id.* § 1 (a) (6).

damage to non-vehicular property. For a motorist owning an expensive automobile, optional collision coverage may cost more than his premiums under the present system for collision and property damage liability coverages, since his present collision coverage expense is reduced by subrogation of the insurer to tort claims against other drivers. For those owning less expensive automobiles, total premium costs will be reduced, even for the owner who carries the optional collision coverage. This underscores a major argument for removing damage to vehicles and their contents from the tort liability system. That is, if tort liability for vehicle damage is retained, owners of less expensive cars are required to pay liability insurance premiums which reflect the exposure to loss of other persons' more expensive vehicles. Owners may also elect an inverse-liability collision coverage, covering the vehicle when the driver of the other vehicle is at fault. This would give the owner the benefits that he might collect from other drivers under the fault system. With this coverage, however, the owner of a less expensive vehicle is not required to pay a premium covering the loss exposure of other, more expensive vehicles.

The primary purpose of the fifth exception is to retain the tort action of a person who has left his car in a parking lot or parking garage and whose vehicle has been damaged because of the conduct of an employee of the lot or garage.

Basic reparation benefits are not tied to the injured person's current wage level, but provide for recovery of future loss caused by the injured person's inability to engage in work. On the other hand, basic reparation benefits for work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss are restricted to a total limit of $200 in any one week period. A threshold requirement of the retained tort action for excess economic loss is that the injured person either be continuously disabled for more than 6 months or die from his injuries. Recovery is limited to excess loss which follows the 6 months continuous disability or death. If an injured person qualifies for recovery of excess economic loss, he is not entitled to recover for all economic loss for which basic reparation benefits have not been or will not be paid, but only that which is excluded from payment of basic reparation benefits by reason of the $200 standard weekly limit on benefits for certain economic losses. He cannot recover for loss unrecoverable because he has elected certain optional exclusions or deductibles. For example, if a person has elected to exclude all benefits for all replacement services loss, that loss would be unrecoverable as basic reparation benefits because he had elected the exclusion and not because of the $200 weekly limit. Hence, no matter the size of

his loss, his tort recovery pursuant to the sixth exception would not include damages for replacement services loss.

The thrust of the seventh exception is to preserve tort actions for noneconomic detriment only for persons who have suffered very serious injury. This is accomplished through two separate, but related, devices. First is the requirement that one of four alternate threshold tests be met. Of the three threshold tests other than death, two require that there be permanent injury. The third refers to temporary disability for 6 months and is narrowly defined to require complete inability of the injured person to work in his occupation. Permanent injuries which do not completely disable the person from engaging in work may qualify under the threshold tests relating to significant permanent injury or serious permanent disfigurement. Second, if a threshold test is met, any recovery is reduced by a statutory amount, the suggested amount being $5,000. The threshold tests, other than death, will inevitably require judicial interpretation. For this reason, the thresholds are coupled with an exemption designed to reduce the area of contention as to whether minor injuries fall within one of those threshold tests, and to reduce the cost of the system by eliminating recovery of damages for noneconomic detriment by those less seriously injured. It should also reduce the incentive for litigation, on the part of those with trivial injuries, as to whether one of the threshold tests for recovery of damages for noneconomic detriment has been met. Without a significant exemption, many accident victims whose claims for economic loss had been fully compensated by basic reparation benefits and who had not suffered very serious injury would have an arguable case, with some settlement value, for recovery beyond their out-of-pocket losses.

From the above it can be seen that there are substantial areas in which tort liability remains in effect for injury related to motor vehicle accidents. A person may suffer loss and be entitled to reparation benefits as a result of the maintenance or use of a motor vehicle and still have a tort action, for example, against an automobile manufacturer. As to these possible tort recoveries, it is desirable to prevent duplication of recovery by the injured person for the same elements of loss and to vest control of the right of recovery in the person having the real economic interest. To accomplish this result, the Act allocates the beneficial interest in and control over the remaining tort and related causes of action or claims between the injured person and the reparation obligor on the basis of the kind of loss for which recovery is sought. Thus, the reparation obligor is deprived of any right of subrogation or reimbursement from the proceeds of a claim for noneconomic detriment because those kinds of loss are not compensable by basic reparation

insurance. On the other hand, the Act provides that to the extent a claim arising from an injury is for recovery of elements of damage which are compensable by reparation insurance, and a reparation obligor has paid benefits or is obligated to pay future benefits, the claim is vested by subrogation separately in the reparation obligor. To the extent that other elements of damage not compensable by reparation benefits are recoverable, the claim or cause of action remains with the injured person or his survivors. The subrogation provision is not limited to tort claims, but extends to claims for breach of an obligation or duty causing the injury in order to assure that there will be reimbursement from recovery such as those for products liability if they are based, in a particular state, on legal theories other than tort.

III. Compulsory Insurance

A. Security for Basic Reparations Benefit and Tort Liability

The Act broadly requires the maintenance of security for basic reparation benefits and tort liability for all vehicles operated or registered in the enacting State, except those owned by the United States, other states, or their entities. The minimum required limits for tort liability are $25,000 per person per accident for bodily injury and $10,000 per accident for property damage. The out-of-State owner of a motor vehicle registered in another state whose automobile is operated with his permission in the enacting State must maintain security while the vehicle is present in the enacting State. There is no waiting period, nor does the Act permit operation in the State for a short period of time without the required security. With reference to motor vehicles which are not registered in the enacting State, the obligation to provide security exists only if the vehicle has been operated in the State by the owner or with his permission, and only while the vehicle is present in the State. Nevertheless, it may be concluded in some cases that a person entrusted with the vehicle has the owner's permission to operate the vehicle in the State, even if the owner has not expressly authorized operation in the State. On the other hand, operation of a motor vehicle in the State by a thief would not of itself constitute operation with the owner's permission. Borderline cases concerning scope of permission must be decided on a case-by-case basis, as they have been under current owner-consent statutes. If the vehicle is registered in the enacting State, or has been operated in the State by the owner or with his permission, the security requirement applies even if the vehicle was operated by a thief or other converter at the time of the accident.

The requirement for maintenance of security may be met by a policy of insurance or through self-insurance. A governmental entity has

available a third method of complying with the security requirement under the Act. If it lawfully obligates itself to pay basic reparation benefits in accordance with the Act, the security requirement will be satisfied. Thus, the United States Government, if it obligates itself to pay basic reparation benefits, is treated as an owner of vehicles who has provided the required security and is relieved of the tort liability which is imposed on owners of unsecured vehicles.

Failure of an owner to comply with the security requirement subjects him to criminal penalties[16] as well as the retention of full tort liability.[17] If he is injured, his benefits from the assigned claims plan are substantially reduced.[18]

B. Included Coverages and Conversion of Out-of-State Policies

The Act assures that every contract purporting to do so contains the mandated basic reparation and liability coverages regardless of the language actually used in the contract. In addition, every contract of liability insurance for bodily injury, wherever issued, covering ownership, maintenance, or use of a motor vehicle is deemed to include the basic reparation benefit coverages and the minimum security for tort liability required by the Act, and qualifies as security covering the vehicle while it is in the enacting State. The effect of this provision is to convert a foreign insurer's automobile or motor vehicle liability policy or contract to the coverages required under the Act, if the insured vehicle is registered in the enacting State or operated in the State with the owner's permission. Since only liability insurance contracts are converted, an insurance contract limited to collision and comprehensive coverages is unaffected by this provision. Given the ready ability of the owner of a motor vehicle to drive his vehicle from state to state within a few days over an interstate highway system, it is unreasonable for an insurer to argue that it could not contemplate out-of-State use of the motor vehicle, or that it could only contemplate or foresee use within a limited geographic area. Accordingly, operation of the insured vehicle within the State, standing alone, should be a sufficient contact allowing the State to impose its substantive laws upon the out-of-State insurers of an out-of-State vehicle.[19]

The Act also contains another provision which declares that an insurer authorized to transact or transacting business in the enacting

---

[16] *Id.* § 37.
[17] *Id.* § 5 (a) (1).
[18] *Id.* §§ 18 (c) - (d).
[19] *Cf.* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

State may not exclude, in any contract of liability insurance for bodily injury, wherever issued, covering ownership, maintenance, or use of a motor vehicle, the basic reparation benefit coverages and required minimum security for tort liabilities required by the Act. This provision is, in part, a safety valve in the event the broader provision mentioned above were held to be unconstitutional. It also precludes insurers from including provisions in their out-of-State liability contracts which might mislead insurers to suppose they were not protected under their policies for basic reparation benefits when their vehicles were operated in the enacting State.

Policies of insurance which provide coverage only for liability in excess of the required minimum tort liability limits are expressly excluded from the operation of the two conversion provisions just discussed.

C. Cancellation and Nonrenewal

It is critical to the success of the system created by the Act that approved security for the payment of reparation benefits and tort liabilities be continuously in effect covering as many vehicles operated in the State as possible. Except in the limited cases involving government vehicles or where self-insurance is an available alternative, insurance purchased from private insurers is the only way in which the security can be provided in compliance with the Act. The potential consequences to an owner required to maintain security of an interruption in coverage are serious.[20] Moreover, the public has viewed the practice of canceling or not renewing automobile insurance coverages by insurers as an undesirable practice subject to abuse and overutlization. The issue has been one of chronic political concern and over two-thirds of the states now have some kind of statutory or regulatory restriction on cancellation or nonrenewal. Whatever may be the advantage to insurers from an underwriting standpoint of a retained power to freely and unilaterally cancel or modify insurance, they are outweighed by the need of consumers to be able to rely upon the stability of their insurance for reasonable periods of time.

The basic principle which the Act incorporates in striking a balance between the business flexibility needed by insurers and the need of consumers for stable coverage is that the insurance, once underwritten should not be terminated or modified by the insurer for at least one year and annual periods thereafter, except for nonpayment of a premium obligation and except for whatever right the insurer may have under

---

[20] *See* p. 122 *supra.*

other applicable law to rescind for fraud or other willful misconduct of the insured in the inception of the insurance. The Act applies only to insurance providing security covering a motor vehicle registered in the enacting State pursuant to the requirement of security imposed by the Act. It would not apply to an automobile liability insurance policy written outside the State on a vehicle not registered in the State even though reparation benefits may be recoverable under that policy and the policy is deemed to qualify as security covering the vehicle. Because the cancellation problem in the past largely has been confined to private passenger automobile insurance and application of the provision to commercial coverages might create additional problems, "fleet" ownership situations involving five or more vehicles under common ownership and insured under single insuring arrangements are exempted from the application of the Act. Generally, the exemption will be operative only in commercial ownership situations, but to the extent that a few non-commerical owners of five or more vehicles are exempted, they may be presumed to be sophisticated enough in the administration of their insurance affairs so that the protection of the Act is unnecessary.

D. Assigned Risk Plan

The Act requires the formation of an organized plan which will assure the ready availability of necessary automobile insurance coverages to all consumers. It is similar in purpose and concept to existing assigned risk statutes. The objective is to insure that all reasonably needed and customary coverges will be conveniently and expeditiously available to all applicants subject to the security requirements of the Act. It is the responsibility of the insurance commissioner of the State to see that a satisfactory plan is adopted and implemented. The commissioner is granted broad powers either to approve and regulate a plan developed by insurers or, if necessary, to establish and operate one directly.

With respect to accessibility to insurance through plans of this type, it is necessary to achieve a balance between two competing policy goals. On the one hand, the goal of making insurance coverages readily available to all who need them dictates that the provision of insurance through the plan not be unduly strictured. On the other hand, it is undesirable to have the plan become a primary market available to consumers who can reasonably obtain insurance in ordinary markets. Hence, the question of eligibility for insurance through the plan must be addressed. The insurance commissioner of the State is in the best position to prescribe the specific criteria for eligibility. However, the

Act does establish a general test and an important corollary to it. The general test is that insurance through the plan is to be made available to all who cannot conveniently obtain it through ordinary market channels. It is possible under some conditions, however, to have an active special market develop in substandard risks with rates that are exorbitant in the sense that they are in excess of what applicants would be reasonably charged through the plan. Hence the corrollary is that in order for the applicant to be denied coverage through the plan, the applicant must not only be able to obtain the needed coverages conveniently in the voluntary market, but must be able to do so at rates not in excess of those applicable under the plan.

The Act would require a systematic rate structure, though not a uniform rate, for all persons insured through the plan with rates which are reasonable and not unfairly discriminatory. In this regard, it would not permit plans, such as some which were once common but have gone out of fashion, in which the rate charged an assigned risk applicant is a surcharge rate varying with the company to which he is assigned. As persons who must obtain insurance through plans of this type generally do not constitute a sophisticated group nor a competitive market, the Act requires that the rate under the plan be adopted or approved by the insurance commissioner.

All insurers authorized under the laws of the enacting State to write any of the coverages provided through the plan are required to participate in the plan. The financial burden of losses and expenses of the plan, to the extent they exceed premium income, are to be equitably apportioned among all participants. The determination of an equitable basis for apportionment, considering all factors as to kinds and volumes of coverages of various types written, is left to the insurance commissioner in the exercise of his sound discretion.

IV. Reallocation of Costs—Sections 38 and 39

A. The Need

A system of equitable allocation of burdens among insurers and other reparation obligors is necessary because of the effect this Act would otherwise have on the distribution of the burden of providing compensation for injury to persons and the burden of cost for vehicle damage sustained in car-truck collisions. The great majority of all persons injured in car-truck collisions are occupants of cars, and the physical damage to cars and injury to occupants of cars in car-truck collisions is, on the average, far more severe than that sustained by trucks and occupants of trucks.

Under the tort liability insurance system, ordinarily the payment made to an occupant of a car in settlement of his tort claim, or in satisfaction of his judgment, arising from a car-truck collision, is made by the liability insurer carrying coverage on the truck. Though precise data are not published, it has been estimated that over 90 percent of the total payout by liability insurers and self-insurers on claims for injuries sustained in car-truck collisions is paid by liability insurers for trucks, or by self-insuring truck lines, and less than 10 percent by liability insurers for cars. Whether or not this estimate is correct, it is clear that the percentage of these costs now borne by truckers is very great and that borne by car owners is very small.

If sections 38 and 39 were deleted, enactment of this Act would almost exactly reverse the distribution between truckers and car owners of the burden of costs and insurance premiums arising from car-truck collisions. Basic reparation insurers of cars would pay basic reparation benefits for nearly all of the injuries to persons in cars under the provisions on priority of applicability of security,[21] while truckers and their insurers would receive protection against both vehicle damage and personal injury tort claims under the provisions on abolition of tort liability.[22] Truck insurers would thus save all but a small fraction of what they now pay out under the tort liability system. It is conceivable that all of the savings achieved by elimination of tort actions arising from operation of motor vehicles would be allocated to truckers, with the consequence of massive reduction of premiums for them, while premiums for car owners would be increased over present levels.

This transfer of costs to car owners that would occur is unfair by any standard of judgment. It is unfair when judged by the standards of the tort liability system, as demonstrated by the mirror reversal of costs that would occur. It is likewise unfair when judged by standards concerned with characteristics of vehicles affecting the probability and severity of injury to persons arising from their use. The provisions on priority of applicability of security,[23] which would in the absence of this section lead to that result, were designed to allocate the initial burden of paying benefits for reasons concerned with protection and convenience of injured persons and administrative simplicity. To assure a fair allocation of costs and burdens, there must be some procedure for reallocating accident costs equitably.

Section 38 is designed to meet this need by declaring a principle of reallocation among insurers and providing a flexible framework

---

[21]UMVARA § 4.

[22]*Id.* § 5.

[23]*Id.* § 4.

within which the commissioner of insurance on his own initiative, or insurers, subject to regulation by the commissioner, may develop an equitable arrangement, improving it from time to time as experience with the new system grows. This could be accomplished by (1) the development of rating classifications that distinguish trucks of various kinds and classes from cars, (2) the establishment of initial rates based on estimates of the average payout the insurer will have to make for each policy in a given classification, and (3) the development in time of revised rates based on projections from actual payouts during the period of experience under the system.

B. Existing Forms of Reallocation and Pooling

The tort liability insurance system, from its inception, has provided for a form of reallocation commonly called subrogation. Other forms of reallocation as well have been used in recent decades.

Under subrogation procedure, the liability insurer, after paying a claimant, is entitled to enforce certain kinds of legal rights of its insured (on whose behalf it has paid the claimant) against third persons. For example, if two drivers negligently contributed to injuring a pedestrian who was struck by one of the cars after they collided, the liability insurer of one of the drivers, after making a settlement with the pedestrian and taking a full release, is in many states entitled to proceed as subrogee to the insured's cause of action for contribution from the other driver and his liability insurer. Thus, the insurer first paying shifts to the other insurer a part of the burden of paying compensation to the pedestrian. This form of reallocation among liability insurers has been used virtually as long as liability insurance itself.

Other forms of reallocation within the tort liability system have come into use more recently. One type was developed in states having unsatisfied judgment funds during the period before uninsured motorist coverage was introduced. The fund paid specified classes of claims for injuries sustained in motoring accidents and in effect reallocated a major portion of the burden of these losses through assessments against insurers writing motor vehicle liability insurance in the state. In turn, the insurers were allowed to distribute the cost of these assessments to their policyholders by increasing the premium charges.

These and other reallocation procedures are instances of a broader principle that might be referred to as "pooling." Procedures for reallocation accomplish pooling through redistribution of losses after payment of the claims of injured persons. Another form of pooling that is even more familiar involves allocation of risks before losses occur. The most

common pooling arrangement of this type is the assigned risk plan.[24] The pooling system of unsatisfied judgment funds is to some extent a pooling in advance of losses, since assessments are made in anticipation of losses and not merely in retrospect to cover losses already paid out by the fund.

The two examples of reallocation given above are based on quite different principles of reallocation. One – the subrogation procedure – is a fault-based, case-by-case procedure. That is, the entitlement of one insurer to transfer part of its initially paid costs to another insurer in the system is determined on the basis of fault and is determined for each case separately, no provision being made for dealing with large numbers of cases simultaneously through actuarial procedures. The second illustration – the financing of unsatisfied judgment funds through assessments – is a system of pooling in which the determination of the entitlement of the fund and the liability of insurers to assessments is made for large numbers of cases simultaneously, on the basis of accumulated data and projections for the future.

C. The Reallocation Principle Under Section 38

A case-by-case procedure is inherently more expensive to administer than a procedure under which a determination is made for large numbers of cases simultaneously. Also, a fault-based procedure is inherently more expensive to administer than a procedure under which entitlements and liabilities relating to reallocation are based on criteria that do not require the investigation and marshalling of evidence of fault. Thus, a fault-based, case-by-case reallocation procedure is the most expensive of all. This Act provides for lifetime no-fault benefits covering losses up to very substantial levels and preserves relatively little of the tort system as a source of compensation for injured persons. In this context it is appropriate also to dispense with fault as a basis for case-by-case reallocation. Thus, the principle of reallocation adopted in section 38 is one not based on case-by-case determinations of fault in collisions between similar vehicles. The section explicitly declares that the commissioner of insurance shall not permit insurers to establish a system of fault-based, case-by-case reallocation in cases involving only ordinary passenger automobiles.

A second important feature of the principle of reallocation adopted in section 38 is that the criteria for reallocation are concerned with loss-causing propensities of vehicles, not drivers. While it would be possible to develop criteria for reallocation based on characteristics of

---

[24] *See* p. 124 *supra*.

drivers without going all the way to case-by-case examination of their conduct, the expense of administering the reallocation system would rise in proportion to the degree to which the characteristics of individual drivers become relevant. A system of reallocation limited to vehicle characteristics can be based on relatively objective criteria that will hold the costs of administration to tolerable limits, even if a case-by-case reallocation procedure is used. Moreover, to the extent that driver characteristics are reflected in accidents, they will be, to some considerable extent, reflected in claims paid by the driver's insurer. Differences in the amount of claims paid under different drivers' policies can be reflected in rates without reallocation. Because the tendency of larger vehicles is to harm lighter vehicles and their occupants more seriously, this tendency will be inversely reflected in claims paid by the insurer of the heavier vehicle. The need for a system of reallocation based on vehicle characteristics rests, then, on a considerably stronger argument of necessity than does the need for reallocation to facilitate further refinement of premium charges to drivers with different characteristics.

D. Reallocation Procedures Under Section 38

Section 38 states the principle of reallocation broadly, subject to the two limitations explained above. It then authorizes the commissioner of insurance to establish any system he may devise within this broad framework and also provides for the development of other systems of reallocation devised by insurers and approved by the commissioner. Thus, in order to facilitate gradual development of improved systems, the section provides for initiation of new systems among a limited number of insurers by agreement among them, approved by the commissioner of insurance. If some insurers are able to develop procedures that offer promise of improvement, but not such assurance of success as to justify imposition of their system upon all insurers, the commissioner may authorize them to use the new procedure as to claims among themselves, even though some other procedure continues to apply as between any one of their group and any insurer outside their group. This flexibility for experimentation enhances the prospects for evolutionary development of more sophisticated and less expensive procedures that continue to serve the objectives of equitable allocation of burdens.

E. Back-up Reallocation Procedures Under Section 39

Section 39 creates a case-by-case reallocation system based upon weight of motor vehicles and declares that this system shall be operative unless the commissioner of insurance approves or establishes some other

reallocation procedure within the broad framework of section 38. This specific system becomes operative only if the commissioner does not authorize or establish some other system.

The specific system detailed in section 39 is not intended as the final answer to the need for reallocation within the basic reparation system. Rather, it is intended that it function unless and until some better system is devised in the light of experience and accumulating data about the functioning of the total reparations system. A new system may be devised by insurers with approval of the commissioner of insurance or by the commissioner of insurance on his own initiative under section 38. If the specific system of section 39 should prove to be ideal, it may be retained. But if better arrangements can be devised, section 38 as a whole creates a flexible framework within which an improved system can be implemented without a change in the Act.

One reason for anticipating that a better system than the one detailed in section 39 may be devised in time is that this system, though avoiding the expense of administering fault-based criteria for reallocation, does incur the administrative expense of case-by-case reallocation. After experience with the system, the commissioner of insurance may determine that nearly identical allocations of burdens among insurers can be achieved by periodic accounting or "squaring-up" among groups of insurers having a substantial volume of claims and counterclaims for reallocation among them, or even by a pooling arrangement among all insurers on the basis of their respective volumes of specified classes of policies written, rather than upon the basis of claims experience under individual policies. The Act does not mandate the adoption of a general or actuarial procedure, but it creates the framework within which that kind of system may evolve.

A second reason for anticipating that a better system than that of section 39 may be devised in time is that the system there provided does not take account of the respective propensities of different vehicles to effect probability and severity of injury to persons because the different vehicles have different devices for the protection of occupants, nor does it take into account vehicle design characteristics, other than weight, which may affect injury severity of non-occupants of the vehicle. If, for example, it should happen that effective air-bag restraint systems that substantially reduce the risk to occupants are installed in some passenger cars, the commissioner of insurance may determine that this difference from other passenger cars has enough effect upon the probability and severity of injuries that it is necessary to take this vehicle characteristic into account in the reallocation system in order that, in the language of section 38: "The allocation of the financial

burden of losses will be reasonably consistent with the propensities of different vehicles to affect probability and severity of injury to persons."

F. Arbitration

In order to minimize the administrative expense and the burden on the judicial system incident to any controversies that may arise among insurers with respect to claims for reallocation, section 38 requires that all disputed claims for case-by-case proportionate reimbursement be submitted to binding arbitration rather than being filed in the courts. In view of doubts about both the validity and the desirability of requiring self-insurers and obligated governments to participate in binding arbitrations, they are not included in this provision for compulsory arbitration.

V. Conclusion

The Uniform Motor Vehicle Accident Reparations Act creates a complete system of reparations for automobile accident victims and space does not permit a review of all of its provisions in this article. The Act deals with such other matters as added reparation coverages, attorneys fees, assignment of benefits, exemption of benefits, discovery, rehabilitation, lump-sum and installment settlements, judgments for future benefits, and limitation of actions, to mention a few. It is without a doubt the most comprehensive and finely tuned piece of proposed legislation dealing with the automobile accident reparations problem.

NATIONWIDE NO-FAULT

*Warren G. Magnuson**

I've finally reached
The end of endurance
With a friend who thinks "no-fault"
Is earthquake insurance
—Richard Armour

No — no-fault is *not* earthquake insurance. Rather, it is a new name for an old and tested form of insurance which today should be applied to automobile accident injuries and deaths.

At long last the problem of auto insurance — a problem which affects every home financially and emotionally, and every person as a consumer or as a probable future victim — is starting to get the serious and comprehensive attention it deserves. On May 24, 1972, a bipartisan majority of the members of the Senate Commerce Committee voted 13-4 to recommend passage of the "National No-Fault Motor Vehicle Insurance Act."[1] On August 8, 1972, the full membership of the United States Senate, after intense lobby pressure, voted to sidetract Senate bill 945 to a dead-end study by another committee, but the razor-thin majority of the opponents (49-46) is a clear indication that national no-fault is an idea whose time has come — almost.

Although I am a proponent, a sponsor, of automobile insurance reform legislation, this article is not intended as a "brief" nor as an "apologia." Rather it is an attempt to set forth the relevant concerns and considerations to which law students, lawyers, and legislators should pay heed. The reader should, however, be mindful of my own conclusion that these concerns and considerations point to speedy enactment of nationwide no-fault legislation as not only the best but as the only viable and practical response to the current automobile insurance mess. Others may draw different conclusions from the data.

This article will consider four questions. First, should the nation retain the present method of compensating the survivors and victims of automobile accidents (*i.e.*, the negligence-liability insurance system)[2]

---

*United States Senator from Washington and Chairman of the Senate Committee on Commerce.

[1]S. 945, 92d Cong., 2d Sess. (1972).

[2]It should be noted that the present automobile insurance system does contain no-fault elements. In all 50 states, motorists purchase property damage collision coverage, which is a no-fault policy. In most states, motorists can buy medical

or should the United States change to the method of compensating survivors and victims known as the no-fault automobile insurance system?[3]

---

payments coverage and uninsured motorists coverage, both of which compensate under certain conditions regardless of fault. But these policies are purchased *in addition* to the basic liability insurance policy for personal injury and property damage caused by the negligence of the insured. It should also be noted that five states — Massachusetts (1971), Florida (1972), New Jersey (1973), Connecticut (1973), and Michigan (1973) — will have in operation sometime in 1973 limited no-fault motor vehicle insurance laws. Once again, however, these programs pay only limited compensation and the motorist must buy these policies *in addition to* the basic liability insurance policy for personal injury damage caused by the negligence of the insured where such damage exceeds the threshold requirements for a negligence lawsuit specified in the state statute. Several other states now require motorists to purchase first-party insurance coverage for automobile accidents and repeal the collateral source rule as to those benefits; but this purchase is *in addition to* the basic liability insurance policy, and there are no restrictions on lawsuits. Notwithstanding these no-fault elements, the preponderance of fault and liability insurance is so overwhelming that it is not inaccurate to refer to the present system in the 50 states as the negligence-liability insurance system.

[3]One consideration to keep in mind is that there is no such thing as "the" no-fault automobile insurance system. For purposes of these remarks, the phrase refers to *any* system of compensation and insurance which meets the suggested guidelines of the U.S. DEP'T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 133-37 (1971) [hereinafter cited as VEHICLE CRASH LOSSES]. The six elements in the DOT recommendation are here set forth verbatim:

1. Compulsory First-Party Benefits

Under the ultimate configuration of the system, every owner of a motor vehicle should be required to carry insurance protecting himself, his family and every uninsured passenger or pedestrian suffering injury as a result of an accident involving the insured vehicle for all economic losses they thereby incur for the amounts specified. In addition, the insurance should protect the insured and all members of his family who are part of the same household against losses suffered when they are pedestrians or passengers in some other vehicle.

2. Required Medical Benefits

The goal of the ultimate system should be to provide full coverage for all medical benefits with a relatively small permissible deductible per accident but with very high mandatory limit. Any deductible voluntarily assumed by the car owner on behalf of himself and his household or any maximum coverage limit would not apply, however, to the medical losses of uninsured passengers and pedestrians. Included in covered benefits would be all medical rehabilitation expenses within the limits provided. Payment of benefits by a carrier under this coverage should automatically remove the obligation of any other insurance carrier to pay benefits to the extent that the costs are covered by automobile insurance.

3. Income Loss Protection

With full implementation of this plan, coverage should be afforded for a relatively high percentage of earned income of the injured or deceased auto accident victim. There should be a short, permitted waiting period at the option of the insured for the start of benefits and a permitted monthly benefit ceiling by the insurer of perhaps $1,000. Voluntarily assumed deductibles or any maximum coverage limit would not apply to pedestrians. Higher benefits for the insured or his family could be made available at the option of the insurer and insured.

This coverage should pay wage continuation benefits whenever an injured person is prevented from working whether as a result of his disability or during his participation in an approved rehabilitation program. The fact that his rehabilitation program was not necessary for vocational objectives but only to deal with other handicaps should not excuse the payment of wage continuation benefits. The benefit program should provide for modification as provided contractually between the insurer and insured because of changed circumstances, e.g., the remarriage of a surviving spouse, surviving children reaching their majority, etc.

The minimum duration of mandatory income loss protection should, and probably could, be finally established only after some further investigation and experimentation. Initially, minimum duration might be set at three years, except for victims in approved rehabilitation programs whose protection might continue as long as necessary. Longer durations should be optionally available from the beginning and should also be considered for inclusion in the mandatory coverage as experience dictates. A lump sum burial benefit of perhaps $1,000 per person should be required. Any higher benefits should be optional on the part of the insurer and the insured.

4. Lost Service Benefits

The goal of the system should be to provide coverage for the cost of necessary replacement services for non-employed persons (e.g., housewives) up to a benefit of $75 per week with a permitted waiting period for benefits at the option of the insured of up to 60 days. Minimum duration of mandatory protection would be the same as for income loss.

5. Property Damage

Ultimately, with the full shift of economic loss compensation to first-party insurance, coverage of damages to property, including the insured vehicle, might be required, but with a permissible deductible referable to the vehicle only at the option of the insured of up to a rather high level, perhaps $1,000 or a third of the value of the car, and with a permissible limitation of coverage by the insurer of $10,000 per accident. There would be no deductible with respect to the non-vehicular property of others damaged in an accident.

6. Elimination of Action for Damages

The goal of the system should be that no recovery for any loss of a type covered by the applicable required coverage would be permitted in any private action for damages. The insured victim's sole recourse for benefits for wage loss, medical loss, lost services, funeral expense and perhaps property damage should be limited to the insured's required coverage and any additional optional coverages that he has elected to purchase, whether under an auto insurance policy or other voluntary loss reparation program.

To the extent that insurance purchasers are willing to pay for duplicate coverages for the same loss and insurers are willing to write duplicate coverage, the practice of cumulating benefits should be allowed. However, unless each policy is clearly stated to be cumulative, only one recovery would be legally permissible with the order of priority among private sources being: (1) auto insurance benefits; and (2) other insurance benefits. In this way, it should be possible to ensure a much better coordination of benefits, with duplicate recovery occurring only where both the insurer and insured had known and agreed about it in advance.

The existing right to sue for damages resulting from negligence in car crashes might be continued for intangible losses, and if so could be subject to one limitation: no person should recover for intangible losses unless he establishes that he suffered permanent impairment or loss of function or permanent disfigurement, or that he incurred personal medical expenses (excluding hospital expenses) as a result of the accident in excess of a rather high dollar threshold. Any dollar threshold initially chosen should not be considered inviolable but should be reviewed as to its appropriateness at regular, specified intervals.

Drivers should, of course, be permitted to continue to insure against this residual third-party liability.

Second, if the nation is to adopt no-fault and relegate the present system to history, should this result be achieved by federal[4] legislation forcing state action or by state action only in each of the 50 states?

Third, if a nationwide approach is selected, what are the terms, content, and structure of such legislation likely to be?

Fourth, how much would such a plan cost?

I. Why No-Fault?

The negligence-liability insurance system has failed. It has failed to compensate victims of automobile accidents adequately. It has failed to compensate victims fast enough. It has failed to compensate victims fairly. It has failed to expend enough premium dollars on compensation — too many go into administrative costs like lawyers' fees. It has failed to give victims the incentives or the economic means to rehabilitate themselves. It has failed to do anything to reduce the tragic annual human loss resulting from automobile accidents.

This indictment may be considered severe, but it has been drawn by every impartial study of the subject in recent years, including the $2 million study commissioned by Congress[5] and undertaken by the Department of Transportation (DOT).

The conclusion of the DOT study was unequivocal: "In summary, the existing system ill serves the accident victim, the insuring public and society. It is inefficient, overly costly, incomplete and slow. It allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system. Both on the record of its performance and on the logic of its operation, it does little if anything to minimize crash losses."[6] My colleague, and the co-sponsor of Senate bill 945, Senator Philip A. Hart agrees: "[The present system] completely malapportions benefits, aids and abets the misallocation of other recovery resources,

---

[4]Again, there is no such thing as "the" federal no-fault legislation. The basic alternatives are (1) "national" legislation which shifts to the federal government some or all of the powers and duties now exercised by state departments of insurance and (2) "minimum standards" legislation which requires each state to enact a system that meets the federal minima within a certain period of time. Senate bill 945, as reported out of committee, embodied the minimum standards approach. Proper regulation of the casualty insurance industry is a task that seems to be beyond the capacity of some states, but the issue of compensating the automobile injury victim should be kept separate from the larger issue of insurance regulation. No attempt is made in Senate bill 945 to interfere with the current national policy, expressed in the McCarran-Ferguson Act of March 9, 1945, ch. 20, Pub. L. No. 15, that the regulation of insurance is a matter for the states.

[5]Act of May 22, 1968, Pub. L. No. 90-313, 82 Stat. 25.

[6]Vehicle Crash Losses, *supra* note 3, at 100.

inhibits the restoration of health and productivity, wastes valuable judicial resources, and discourages more efficient and fairer methods to maximize the reduction of accident and accident avoidance costs."[7]

What does America need in its system of automobile injury compensation?

(1) *Reduction of the economic waste in the present system.* According to the DOT study, the present insurance system "would appear to possess the highly dubious distinction of having probably the highest cost-benefit ratio of any major compensation system currently in operation in this country."[8] The present system returns only about 44 cents in benefits to auto accident victims for each dollar paid in premiums to insurance companies. For the most part, this inefficiency is not the fault of either trial lawyers or insurance companies; it is the "fault" of the system. Just as it costs more money to run a steam locomotive than to run a diesel locomotive, a fault insurance system that pays benefits on the basis of loss after a showing of fault is more expensive than that one which pays on the basis of loss only.

There is another kind of waste in the negligence-liability insurance system; it produces overpayment of claims. A study has disclosed that a person with $250 worth of loss, who claims benefits of $1,000 from the other driver and his insurer, may be paid $1,000 because the cost of a $250 claim plus the cost of defending the claim may exceed $1,000.[9]

(2) *Improvement in the scope of coverage and adequacy of compensation of the automobile insurance system.* People who pay insurance premiums may receive *no* insurance benefits from the present system. As stated in the Committee Report[10] which accompanied the Senate Commerce Committee's recommendation of enactment of the Magnuson-Hart bill: "The most obvious group are those innocent or faultless victims of automobile accidents where the potential defendant is also innocent or faultless. A second group not compensated are those who are found to be at fault or contributorily negligent." Even in states such as Mississippi which operate under comparative negligence principles, an at-fault victim is not eligible for compensation for his full loss. Then, too, persons who sustain injury in an accident involving only one car

---

[7]Hart, *National No-Fault Auto Insurance: The People Need It Now,* 21 CATH. U.L. REV. 259, 283 (1972).

[8]VEHICLE CRASH LOSSES, *supra* note 3, at 95.

[9]A Department of Transportation study reported that defendants' lawyers received an average of $819 per case regardless of verdict. U.S. DEP'T OF TRANSP., AUTOMOBILE ACCIDENT LITIGATION 7 (1970).

[10]S. REP. No. 92-891, 92d Cong., 2d Sess. 16 (1972) [hereinafter cited as Senate Report].

will receive no benefits from liability insurance because there is no one to sue in order to collect. Statistically speaking, 45 percent of all those killed or seriously injured in auto accidents benefit in no way from the negligence liability insurance system.[11]

An equally serious deficiency of the present system is its gross undercompensation of the seriously injured. According to the Department of Transportation, the most seriously injured auto accident victims and the families of the fatally injured are the ones who must cope with the greatest amount of uncompensated loss. Seriously injured victims with medical expenses of $5,000 or more recovered only 55 percent from tort insurance, but victims with medical expenses of less than $5,000 recovered 90 percent.[12] The other grossly undercompensated in-relation-to-loss group are people who work. The average loss, for example, for the working man or woman who dies in an auto accident was found to be $40,000, including lost future wages. The average settlement that his bereaved family received for *all* recovery resources, including liability insurance, was just $2,080 or 5 percent. The larger the loss, the less the contribution to compensation made by the tort insurance system and the greater the reliance on wage replacement programs such as sick leave, workmen's compensation where available, and social security.[13]

Undercompensation of the innocent and seriously injured victim is a general phenomenon, a fact which belies and cuts through the rhetoric about right to damages for pain and suffering. "[W]hile tort theory says that qualified (innocent) victims are entitled to compensation for all their losses, both tangible and intangible, even successful tort claimants with serious injuries, who presumably also suffered serious intangible losses, do not on the average recover even their economic loss."[14]

(3) *Creation of incentives to reduce the terrible waste of human resources resulting from automobile accidents.* Under the present system there are few incentives to improve emergency health care and transportation systems and no incentives for victims to participate in rehabilitation programs. The result: people die who need not die; people remain crippled who need not remain crippled.

Today, 58 percent of all auto accident victims treated through emergency medical services never recover in a tort law suit because they are unable to prove fault or freedom from contributory negligence or

---

[11]Vehicle Crash Losses, *supra* note 3, at 35.

[12]U.S. Dep't of Transp., Economic Consequences of Automobile Accident Injuries 281 (1970) [hereinafter cited as Economic Consequences].

[13]Vehicle Crash Losses, *supra* note 3, at 37.

[14]Economic Consequences, *supra* note 12, at 149.

because the defendant was insolvent or only one car was involved.[15] The providers of such emergency health services may, as a result, never get paid at all for their work, or they may in any case have to wait a long time before the case is settled or litigated. Many experts believe that a good emergency health services system in America — one as good as the program that was operated in Vietnam — would significantly reduce the highway death rate, but such a system will cost a great deal of money. Instead of contributing a fair share of that needed money, the $16 billion a year negligence-liability insurance system does not even pay for what it uses.

The present system also provides no incentives aimed at rehabilitating the traffic victim and restoring him to a useful and productive life. "The traditional settlement environment for third party auto bodily injury claims offers nothing to encourage and much to preclude the the early introduction of rehabilitation. . . . [C]onsiderable time, energy, and expense must be devoted to controversy just when rehabilitation measures might most benefit the victim."[16] Another Department of Transportation study found that no rehabilitation program at all was suggested to 88.6 percent of seriously injured victims.[17]

A third way to reduce loss is to provide new incentives to automobile manufacturers to produce and consumers to buy vehicles in which occupants are packaged in such a way that less serious injuries will result in case of accident. The negligence liability insurance system provides no such incentives.

(4) *Reduction of the excessive workload which the present system imposes on judges and courts of each of the states and the federal government.* Although most claims under the negligence-liability insurance system are settled rather than litigated, the number of automobile tort cases filed and the number tried is staggering. At a time when both state and federal courts have difficulty meeting the sixth amendment requirement of a "speedy trial" for criminal cases, much less civil cases, the automobile insurance system uses an enormous percentage of the resources of the state and the federal courts.[18]

---

[15]President Nixon put it this way in his 1972 state of the Union address: "[T]he loss to our economy from accidents last year is estimated at over $28 billion [and traffic accidents accounted for some 60 percent]. These are sad and staggering figures — especially since this toll could be greatly reduced by upgrading our emergency medical services." 118 CONG. REC. 154 (daily ed. Jan. 20, 1972).

[16]U.S. DEP'T OF TRANSP., REHABILITATION OF AUTO ACCIDENT VICTIMS 13 (1970).

[17]ECONOMIC CONSEQUENCES, *supra* note 12, at 377.

[18]The volume of automobile negligence suits not only clogs the courts, but it delays the receipt of badly needed compensation dollars by victims. The following chart shows that as of December 31, 1970, the 10 leading automobile insurance

A bit of dictum in the Massachusetts decision upholding the constitutionality of that state's limited no-fault law is instructive on this point.

> No one who has for any time been in charge of a trial court system (as was the author of this opinion for a number of years) can be unfamiliar with the devastating effect upon the administration of justice which the automobile has produced. For years, in the face of countless experiments, the trial calendars of this country, particularly in metropolitan areas, have become increasingly clogged with motor vehicle tort litigation. No one as yet, notwithstanding heroic efforts in this regard, has found a satisfactory method of disentangling this morass. . . . The problems of society to which the courts have been called no longer permit the luxury of using them as a forum for resolving the ever increasing numbers of automobile accident claims to the extent that has obtained hitherto.
>
> . . . .
>
> Other non-American court systems, heirs with ourselves of the common law, have managed to solve this problem of the superabundance of motor vehicle tort claims in one way or another. It remains, however, a cancer to be rooted out in American Courts.[19]

The Chief Justice of the United States Supreme Court, Warren E. Burger, spoke eloquently to these concerns at the 1971 National Conference on the Judiciary: "We are rapidly approaching the point where

---

companies alone (these 10 companies wrote about 40 percent of the auto insurance in that year) were defending 359,540 lawsuits, which had been filed during the preceding 8 or more years:

AUTO PERSONAL INJURY LIABILITY CASES PENDING AS OF DECEMBER 31, 1970 WHICH WERE FILED, AND WHICH WERE BEING DEFENDED BY THE 10 LEADING AUTO INSURERS UNDER POLICIES ISSUED DURING THE PRECEDING 8 OR MORE YEARS

Companies	Years in which policies were issued									
	Prior to 1963	1963	1964	1965	(sic) 2,608	1967	1968	1969	1970	Total
State Farm	300	363	819	1,915	3,328	6,911	9,788	16,679	7,502	47,605
Allstate	2,326	1,744	2,970	5,487	9,782	16,702	14,454	31,815	14,176	99,456
Aetna Casualty	417	345	918	1,790	3,024	4,616	3,257	7,687	3,232	25,286
Travelers	903	759	1,428	2,512	5,015	8,219	8,137	11,313	4,590	42,876
Nationwide	1,026	833	1,288	1,555	2,634	4,313	5,518	6,731	3,280	27,178
Liberty Mutual	523	407	750	1,225	2,640	4,942	4,546	8,371	3,689	27,093
Hartford Accident	878	600	1,204	1,941	3,307	5,276	4,239	7,159	3,015	27,619
Government Employees	140	195	392	911	2,060	4,206	3,477	7,323	3,583	22,287
INA	588	535	1,079	1,598	2,577	3,611	2,729	3,987	1,517	18,221
Lumbermans Mutual	424	472	750	1,515	2,608	3,791	3,823	5,740	2,796	21,919
Total	7,525	6,253	11,598	20,559	36,975	62,477	59,968	106,805	47,380	359,540

Source: 1970 annual statements, schedule P. pt. 1, filed with State insurance departments.

[19]Pinnick v. Cleary, 271 N.E.2d 592, 602-04 (Mass. 1971).

this segment of Americans will totally lose patience with the cumbersome system that makes people wait two, three, four or more years to dispose of an ordinary civil claim." Burger has also stated that "[v]ery, very good arguments can be made and have been made for taking automobile and other personal injury cases out of the courts entirely, out of all courts, and disposing of them by other means."[20]

(5) *Establishment of an automobile reparations system that is not unfair in its choice of beneficiaries, that allocates premium costs rationally, and that provides timely payment of benefits.* The present system is unfair and discriminatory in its choice of whom to compensate. "Statistics and data gathered by the Department of Transportation make it clear that the negligence based insurance system distributes assets better to those who have the greatest education and who make enough money to support themselves during the time-consuming claim settlement process. Apparently these auto victims can afford to retain the best legal counsel, make better appearances in court (at least in the minds of the claim settlers) and have the resources, determination, and sophistication to fight the system."[21]

This unfairness is an example of a larger weakness: costs (premium charges) under the present system are not allocated in proportion to probable receivable benefits (damages). Under a liability-based insurance system, premiums must be computed on the basis of the payment to be made to the average unidentified claimant. If the insured has earned income greater than that of the average unidentified claimant he receives in effect a subsidy from the system; if the insured has a lower income than that of the average unidentified claimant he pays extra to subsidize that higher wage earner. For example, if the average claimant is a $10,000 wage earner and the insured is a $5,000 wage earner, the insured will pay annual premiums based on the risk of his negligently causing $10,000 damage, but if he himself is innocently injured by a negligent driver, he will only receive $5,000.

The present system is "slower than molasses." One has only to compare the present automobile insurance system, in terms of delivery time, with the workmen's compensation system.[22] The Division of

---

[20]New York Times, July 4, 1971, at 20 (city ed.).

[21]Senate Report, *supra* note 10, at 20. Not-at-fault college educated victims collect from the negligence liability-insurance system, on the average, 63 percent of their losses, where victims who had no formal education or completed 12 years or less of formal education collect on the average only 38 percent of their loss. ECONOMIC CONSEQUENCES, *supra* note 12, at 338.

[22]Workmen's compensation insurance is an interesting analogue to no-fault automobile insurance. Workmen's compensation, a no-fault system to compensate vic-

Industrial Accidents for California reported that for the period July through December 1970, 77.9 percent of workmen's compensation cases were paid their first benefits check within 14 days of the date of disability, and the balance were all paid their first check within 29 days.[23] The Department of Transportation on the other hand, reported that within 30 days after the date of automobile accident injuries, only 21 percent of paid claims had been settled, and that these represented only 3.5 percent of the total payments made on all paid claims.[24]

Under the present liability system, the more serious the victim's injuries, the longer he must wait for compensation. None of the permanently and totally disabled claimants in the DOT survey had his claim settled within 30 days after the accident, and only one had it settled within 90 days after the accident.[25] Another study has found that "injured victims of automobile accidents face average delays in collecting under automobile liability insurance that are ten times as long as the delays in collecting under collision, home owners or burglary insurance and forty times as long as delays under accident and health insurance."[26]

(6) *Achievement of a proper balance between automobile accident compensation for people injured and for vehicles damaged.* Today's system pays more for the repair of damaged motor vehicles than it does for the repair and care of injured human beings.[27] Automobiles are expensive machines. More automobile accidents involve property damage than involve personal injury, and automobile repair costs have been skyrocketing. Nevertheless, some vehicles are more damage resistant than others. A system which contained a built-in incentive for manufacturers to build and consumers to buy damage resistant vehicles would also be

---

tims of industrial accidents, replaced a compensation system based on negligence and contributory negligence that was widely felt to be totally inadequate. No jurisdiction has ever repealed its no-fault industrial accident law to return to a negligence-liability insurance system. Nevertheless, the universal enactment of workmen's compensation laws in the United States took 40 years and encountered fierce resistance from one of the very groups which is opposing no-fault auto insurance.

[23]*See* 117 CONG. REC. 12,464 (daily ed. July 29, 1971).

[24]1 U.S. DEP'T OF TRANSP., PERSONAL INJURY CLAIMS 84 (1970).

[25]2 *id.* at 248-51.

[26]NEW YORK STATE INS. DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 19 (1970).

[27]In 1970, automobile accident victims received $2.8 billion in net personal injury benefits from the present system against $4.9 billion in property loss benefits ($1.7 billion in property damage liability benefits, $2.1 billion in auto collision insurance benefits, $1.1 billion in fire, theft and comprehensive insurance benefits). 117 CONG. REC. 12,639 (daily ed. July 30, 1971).

a system that would direct a fairer share of total premium dollars to people rather than property.[28]

(7) *Improvement of the present automobile accident compensation system without increasing the cost of the product to the consumer.* Some, if not all, of these objectives could in fact be met by continuing with the negligence-liability insurance system and, in addition, (1) making liability insurance compulsory;[29] (2) requiring each insured to carry $125,000/$250,000 in liability insurance coverage; and (3) requiring each motorist to purchase first-party medical payments, income replacement, and loss of services coverage for himself and his family, subject to deduction of such first-party benefits from allowable tort suit recoveries. The system with these modifications would continue to allocate benefits unfairly, but there would be adequate and timely benefits.

Unfortunately for those who would retain the present system, these modifications would prove too cumbersome and too expensive.[30] The present annual national expenditure for automobile insurance (1971 — $16 billion) is great enough. A reformed compensation system should stabilize, if not reduce, present premium costs. The conclusion of the Department of Transportation on this matter was that "[a]dequacy and equity of a better compensation system should not yield to costs in our list of priorities."[31] Nevertheless, we must hold the line on costs.

A no-fault motor vehicle insurance system that meets the DOT guidelines will meet these seven needs.[32] Since this article is part of a symposium on the subject, there is no need to discuss how the mechanism and methodology of no-fault compensation insurance meets these objectives. Rather the discussion will focus on how Senate bill 945, in the context and dynamics of a federal system, answers the appalling deficiencies without undermining other values.

---

[28]"[T]here is no way for liability insurance to distinguish between damage-resistant vehicles and fragile vehicles, or between very expensive vehicles and those of less value, because the liability insurer cannot know what kind of a vehicle its insured will negligently strike." VEHICLE CRASH LOSSES, *supra* note 3, at 97.

[29]Two 1971 United States Supreme Court decisions raise the possibility that either a compulsory liability insurance system or a compulsory no-fault insurance system may become a constitutional necessity. *See* Bell v. Burson, 402 U.S. 535 (1971), and Perez v. Campbell, 402 U.S. 637 (1971).

[30]"[F]urther attempts to modernize the fault insurance system by tinkering with it, while leaving its essentials intact, are sure to be expensive and self-defeating. The operators of the present system would just be buying themselves time with other people's money." NEW YORK STATE INS. DEP'T, *supra* note 26, at 55.

[31]VEHICLE CRASH LOSSES, *supra* note 3, at 139.

[32]Although I am partisan on this question, I believe that a fair reading of all the articles in this issue of the *Mississippi Law Journal* will lead the reader to this conclusion.

II. State No-Fault or Nationwide No-Fault?

There are two basic arguments for nationwide rather than state-by-state no-fault legislation: a negative argument and a positive one. To oversimplify both, the positions are:

(1) All 50 state legislatures will not enact no-fault legislation and, to the extent they do, their plans will be inadequate or phony,[33] and it may take an inordinate amount of time for all states to act at all.

(2) The number of Americans who each year drive or ride in one or more states other than their own is enormous. Each such motorist should be entitled and able to receive fast, adequate compensation if he is injured in an auto accident in the United States regardless of which state it is where he has the accident. If the 50 state legislatures are unable or unwilling to shift to no-fault motor vehicle insurance within a reasonable time,[34] then it is the duty of the Congress to see that the

---

[33]The most frequently mentioned "phony" no-fault proposal is the so-called overlay plan, which has been enacted in Delaware and Oregon, in which first-party medical and wage loss benefits are grafted onto the existing liability policy without any limitation on lawsuits or general damages. The biggest failure in such a plan, an editorial in the *Journal of Commerce* pointed out, "lies in the fact that it does not eliminate the fault concept. [Victims] could still file their so-called 'pain and suffering' lawsuits tie up the courts, and add to the legal expenses of the underwriters. The DOT report calls for the curtailment of lawsuits except for those permanent impairment, loss of functions, disfigurement, or medical expenses above a high threshhold dollar amount." J. of Com., Nov. 6, 1972, at 4. A recent survey compared the experience under the meaningful no-fault laws in effect in Massachusetts and Florida with experience under the "add-on" type laws in Oregon and Delaware. Premium savings to Massachusetts motorists since no-fault went into effect exceed $100 million and additional rate cuts have been ordered for 1973. In Florida there was a required 15 percent decrease when no-fault became effective January 1, 1972 and the Commissioner has ordered an additional decrease of 11 percent on basic coverages for 1973. By contrast, there has been no decrease whatever in insurance premiums in Delaware or Oregon. One company reports that in 1972 only about half as many of its bodily injury claims in Massachusetts are resulting in lawsuits as in 1970; in 20 months the company's total number of outstanding suits dropped 21 percent. In the first 8 months under no-fault in Florida, the company reports that there has been a 4 percent decline in the number of auto bodily injury liability suits. By contrast, the same company shows an increase of 4 percent in the number of lawsuits in Delaware during the first 8 months of that state's add-on law, and in Oregon insurers report a 6 percent increase in the number of lawsuits in 1972 over the preceding year. Address by T. Lawrence Jones, American Insurance Association, November 2, 1972.

[34]In my judgment a reasonable time has already elapsed and only 10 percent of the states have passed true no-fault laws and only 2 percent of the states have met the guidelines of the Department of Transportation. Two years have elapsed since the submission to Congress and the President of the Final Report of the Department of Transportation; more than 3 years have elapsed since the first

shift is made. Under the Constitution, Congress is responsible for the regulation of commerce among the states and the promotion of the general welfare. If the prospects are that the no-fault laws of the states will differ significantly from one another and add up to a confusing hodgepodge of differing systems, benefit levels, and tort exemptions, then it is the duty of the Congress to act to promote a uniform and compatible system in all the states.

On April 17, 1972, Secretary of Transportation John A. Volpe, in a letter addressed to me accompanying his department's responses to a series of questions on state no-fault activity, declared: "In all candor, those of us who would like to see the States do this job themselves can hardly be heartened by their actions to date this year."[35] Prospects in 1973 in the 45 states without any no-fault legislation are not good. This statement is difficult to accept unless one has seen service in a state legislature. On its face, no-fault would seem to be a good issue for a sensible legislator to support. It is a boon to motorists and consumers, as the Massachusetts experience demonstrates; it can't hurt anyone except negligence lawyers and possibly insurance agents and companies, and the latter are few in number. Unfortunately, that small minority has consistently demonstrated more clout in the state legislatures than the overwhelming majority of hardworking, honest, taxpaying, premium-paying citizens.[36]

American jurisdiction, Puerto Rico, enacted a no-fault plan; more than 25 years have elapsed since a neighboring jurisdiction, Saskatchewan, Canada, enacted no-fault; and more than 50 years have elapsed since the idea was first seriously proposed in the legal literature. *See* Carman, *Is a Motor Vehicle Accident Advisable?*, 4 MINN. L. REV. 1 (1919); Rollins, *A Proposal To Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392 (1919).

[35]Senate Report, *supra* note 10, at 82.

[36]This statement should not be interpreted to amount to an indirect assertion that the Congress is free from the pressure of "that small minority." The 49-46 vote in the United States Senate on August 8, 1972 is proof to the contrary. However, members of the Senate and the House of Representatives are in a better position to withstand the pressures because, *inter alia*, their positions are full-time and well-paid; none, or very few, of the members are personally involved as members of firms that practice automobile negligence law or sell automobile insurance; the size of the district he represents makes the member responsive and directly accountable to a much larger number of voters; the Congress operates in the full glare of press and media observation, far more than the average state legislature.

But, because the special-interest-group pressure exists at the federal as well as at the state legislative level, I continue to encourage consumer and other groups to support no-fault legislation at *both* levels. As a political pragmatist who believes that the American consumer needs and deserves a better automobile insurance product than the present system offers, I am more interested in the final result than in which level of government proves to be the most responsive.

A single example should suffice. Serious attempts have been made to enact no-fault legislation in the State of New York. All the factors that normally make for legislative success were present in New York. The state was a pioneer of the concept with the publication of a report to the Governor in 1970 that unreservedly recommended enactment of a complete no-fault system. Governor Nelson A. Rockefeller became an enthusiastic advocate of the proposal, and his party controls both houses of the state legislature. The state has a tradition of legislative pioneering. Despite all this, no-fault has been defeated in two successive legislatures, and there is shocking evidence of minorities imposing their will on the majority through pressure, personal attacks and threats of political retaliation in an election year.[37] The New York example, multiplied 40 times in 1972,[38] suggests an inherent incapacity in state legislative bodies to deal with this issue of reform of the automobile negligence and liability insurance system.[39]

---

[37]*See* New York Times, May 16, 1972, at 30 (city ed.).

[38]Forty-three state legislatures were in session in 1972. Three enacted modified no-fault laws (New Jersey, Connecticut, Michigan). *See* Senate Report, *supra* note 10, at 83.

[39]A disproportionate-to-total-population percentage of the members of state legislatures are attorneys who appear to be generally receptive to their brethren who practice negligence law. The following tables were prepared by an Illinois legislator in connection with his 1971 testimony before the Congress urging federal action. Half the motor vehicles in the United States are registered in the 10 states analysed in these tables:

TABLE 1.—*Members on state legislative committees having jurisdiction over no-fault bills whose occupations were listed as lawyers and insurance—10 selected states, 1969*

State	House			Senate		
	Total committee	Lawyers	Insurance	Total committee	Lawyers	Insurance
California	14	[a]7	1	9	[a]4	0
Florida	13	[a]8	1	7	[a]2	1
Illinois	17	8	4	[b]12	[a]6	3
Michigan	11	[a]2	1	5	[a]1	0
Missouri	17	[a]8	6	8	[a]5	1
New Jersey	7	[a]2	1	5	[a]5	0
New York	18	[a]10	5	18	[a]14	1
North Carolina	21	11	3	14	[a]7	1
Pennsylvania	23	[a]9	8	14	1	[a]4
Texas	21	9	7	17	[a]13	0

[a]Includes chairman.

[b]Insurance Division, Financial Institutions Committee.

Source: State legislative handbooks and manuals.

State development to date has also not been uniform. Each of the five state no-fault statutes is different. It is not my purpose to say which is "better" but rather to urge that a mobile population like that of the United States ought to have similar protection while traveling[40] regardless of where the accident happens to occur.

An encouraging development in the area of state no-fault insurance reform has been the development of a model bill by the National Conference of Commissioners on Uniform State Laws, under the sponsorship of the Department of Transportation. Unfortunately, there is greater difficulty in seeing a uniform bill enacted without major individual state changes in "sensitive" areas.

It has been argued that in changing from a liability insurance system to a no-fault insurance system, the state-by-state approach is preferable because it permits needed experimentation to discover the best features of the new no-fault system. That argument makes sense on its face. But if it is scrutinized carefully, the experimentation argument does not hold. The argument is predicated on the assumption that no-fault insurance is a "new form" of insurance. That assumption is false. No-fault insurance is an established form, indeed the most prevalent form of insurance today.[41] Its efficiencies are established fact.

TABLE 2.—*Members of 10 selected state legislatures whose occupations were listed as lawyer and insurance, 1969*

State	House			Senate		
	Total body	Lawyers	Insurance	Total body	Lawyers	Insurance
California	80	29	5	40	20	2
Florida	119	42	17	48	22	9
Illinois	177	55	25	58	19	11
Michigan	110	19	3	38	8	2
Missouri	163	33	18	35	22	1
New Jersey	80	29	6	40	26	1
New York	150	85	10	57	42	2
North Carolina	120	44	6	50	21	3
Pennsylvania	203	58	23	50	15	6
Texas	150	56	14	31	20	0

Source: State legislative handbooks and manuals.

[40]The need for protection also extends to many people who commute to other states to work. There are 30 metropolitan areas in the United States which include more than one state. In 1970, more than 29 million Americans lived in those areas. These 29 million people need uniformity of automobile compensation systems and laws between the several states in their own metropolitan area.

[41]*E.g.*, life insurance, disability insurance, workmen's compensation insurance, health insurance, fire insurance, theft insurance, marine insurance, casualty-loss insurance are all no-fault forms of insurance. The insurer pays whether or not the insured's death was caused prematurely by his negligence in smoking cigarettes, whether or not the total loss by fire was caused by the insured's negligence in failing to maintain a fire extinguisher, etc.

Where experimentation is needed is in those plans that attempt to combine automobile liability insurance and automobile no-fault (or first-party benefits) insurance. This combination is largely untested and creates novel problems. However, a complete and nationwide no-fault system would eliminate most, if not all, of these problems because the insurance principles themselves have been tried in other areas — *e.g.*, health insurance, disability income insurance, and workmen's compensation insurance.

There are two additional problems with the experimentation argument. First, a state experimenting with no-fault insurance may not set up its no-fault plan in such a way as to permit the retrieval of information concerning the performance of the no-fault experiment. Even if it does, the state may not have good information concerning the operation of its previous system from which it can make reasoned comparisons. Second, the improvements in the automobile compensation system resulting from a no-fault experiment in one state may not be reproduced in another state. For example, the Massachusetts plan may have been beneficial for Massachusetts residents who had previously operated under a compulsory liability insurance plan which had supported a large amount of the property damage costs. But transfer of the Massachusetts plan to South Carolina might not produce the same results.

By establishing a nationwide no-fault plan which prescribes basic economic loss protection for *all* persons injured in automobile accidents while at the same time permitting the states to experiment with deductibles, arbitration, requirements for intangible loss protection and other variations, a situation can be established whereby all Americans obtain quickly the proven efficiencies and benefits of no-fault coverage while permitting state experimentation where it would be helpful in developing further refinements of the basic no-fault scheme.

As the discussion below of the content of the projected nationwide no-fault bill makes clear, its passage would mean little or no encroachment on any existing state no-fault plan which meets the basic guidelines set down in the Final Report of the Department of Transportation.

The federal government has a special responsibility to see that an adequate compensation system is created because most of the people injured in automobile accidents and most of the people killed in motor vehicle accidents are injured and killed while traveling on highways built substantially (50 percent) or almost completely (90 percent) with federal funds. In 1970, of 53,816 fatal motor vehicle accidents, 38,079 (70.7 percent) occurred on federal-aid highways. In the same year,

1,387,000 non-fatal injuries out of a total of 2,700,000 occurred in automobile accidents on federal-aid highways (51.3 percent).[42]

The federal government paid $60 billion of the $83.7 billion which it cost to construct these federal-aid highways.[43] Those federal funds were raised by taxes paid by the citizens of all states on gasoline, tires and tubes, parts and accessories, lubricating oil and trucks. Thus, the welfare of the users of federally financed highways is a legitimate and necessary concern of the federal as well as the state governments. Partnership between state and federal government built our great highway system; a similar partnership is now needed to take care of victims via an efficient, fair, and humane compensation system.

III. Nationwide No-Fault Legislation

The following is a description of the bill reported favorably by the Committee on Commerce of the Senate, with floor amendments which were to be accepted by the sponsors. It is expected that legislation to be introduced in the 93rd Congress will be substantially the same.

Senate bill 945 creates a nationwide automobile insurance system under which all operators, passengers, and pedestrians would be protected against basic economic loss resulting from automobile accidents. The bill achieves this result by establishing nationwide standards for each state to meet or exceed in designing its own no-fault motor vehicle compensation scheme. These minimum standards speak to compensation — swift, sure, and adequate — but they do not upset the basic scheme of state insurance regulation. Nothing in the bill would interfere with the right of a state to assess premium taxes on insurers doing business within its jurisdiction. State action meeting federal requirements would have the force and effect of federal law.[44] The bill provides for an administrative determination as to whether or not a state is in compliance with nationwide standards.[45]

It is not expected to occur in more than a few states, but if the state does not enact a no-fault insurance plan of its own which meets or exceeds nationwide standards within the time period prescribed, the Title III no-fault plan would become effective in that state. A state

---

[42] *See* Fed. Highway Admin., U.S. Dep't of Transp., Fatality and Injury Accident Rates on Federal Aid and Other Highway Systems — 1970.

[43] *See* Quarterly Report on the Federal Aid Highway Program, June 30, 1972, reported in Federal Highway Administration, Department of Transportation News, September 26, 1972.

[44] S. 945, amend. 1341, 92d Cong., 2d Sess. (1972) (introduced by Senator Stevens, R., Alaska).

[45] *Id.*, amend. 1342 (introduced by Senator Stevens, R., Alaska).

could, however, still enact its own plan and come into compliance with nationwide requirements, even after the Title III plan had gone into effect in the state, making the Title III plan, in effect, only a stopgap.

The content of the minimum standards and of the Title III plan, as to which there is debate, should be considered separately and secondarily to the "nationwide" mechanism. Although existing federal legislation on welfare, unemployment insurance, medicaid, and truth-in-lending present certain parallels, the mechanism is novel and amounts to a new approach toward federal-state cooperation of the second American Revolution that President Nixon called for early in 1971. The mechanism would preserve to state government, which is closer to the people, full power to operate the system and to experiment with refinements. It would limit the federal government's role to that of being a "presence" without permitting it to manage, control, or operate the system from yet another bureaucratic palace in Washington, D.C., and it would do this without compromising the basic interest of every American who drives, rides in, or walks near a motor vehicle to be compensated promptly for his full economic losses if he is injured in an automobile accident. There would also be no need to wait 40 years as we did with workmen's compensation.

Under the nationwide no-fault system, most lawsuits based upon liability would be eliminated.[46] Insurance benefits covering basic economic loss would be paid to all automobile accident victims without regard to fault.[47] A person injured in a motor vehicle accident would receive reparations from the company which insured the vehicle in which he was riding or, if he were a pedestrian, the company which insured the vehicle by which he was struck. If the automobile was uninsured, the person would recover his basic economic loss from a state assigned claims plan.[48]

Benefits. An injured victim in a state with a no-fault plan that met minimum nationwide standards would receive the following benefits: (1) all medical and hospital costs up to a total of $25,000; (2) all expenses for rehabilitation up to a total of $25,000; and (3) all wage loss (subject to monthly limitations set by state law in accordance with a computation formula) up to $1,000 per month, expenses for substitutes for services the victim can not perform personally up to $1,000 per month, and funeral expenses up to $1,000 — up to a total of $75,000.[49]

---

[46] *Id.* § 204 or § 302.

[47] *Id.* § 203 or § 301.

[48] *Id.* § 107.

[49] The total maximum benefits may be somewhat less in some states. *See* discussion *infra* of amendment 1399 to Senate bill 945.

Wage loss, under nationwide no-fault, includes loss of future anticipated earnings or loss resulting from the impairment of earning capacity of the employed, the presently unemployed, or those who have not yet joined the labor force. Insurance companies are required to sell greater insurance protection to all buyers who choose to purchase additional protection.[50]

Lawsuits Based upon Fault. Nationwide no-fault places stern limitations upon lawsuits based upon fault because basic economic loss benefits are paid without regard to fault and because the preservation of such suits would impose unnecessary costs on consumers and would allocate the additional necessary premium charges unfairly to the detriment of middle and low income consumers. Under a state plan meeting minimum nationwide standards, tort liability for both tangible and intangible damage is preserved only in accidents between insured drivers and at-fault uninsured drivers or persons engaging in criminal conduct who are at fault. Liability for intangible damages[51] is preserved if an at-fault driver injures a person who is not at fault, and causes death, permanent serious disfigurement, permanent significantly incapacitating loss of body function, or an injury resulting in more than 6 months of "complete inability of an injured person to work in his occupation."[52] Liability for tangible damage is also preserved for expenses in excess of $25,000 medical, $25,000 rehabilitation, or $75,000 wage and other economic loss. Under the Title III plan, tort liability is preserved only when a person not at fault is injured by an at-fault uninsured driver or an at-fault person engaging in criminal conduct at the time of the injury.[53]

The nationwide system proposed in Senate bill 945 also restricts property-damage lawsuits based upon the fault of another. Under a state plan meeting nationwide standards, the owner of an automobile would be precluded from suing to recover damages occurring to his vehicle while it is in use (but not if it is damaged while not in operation). Under the Title III plan, the owner could not sue in any case, but he would have the right to recover on a no-fault basis from the insurance company of a vehicle in use which struck his vehicle while not in use. The car owner would be relieved of the need to purchase liability property damage insurance to protect his personal assets against

---

[50] *Id.* § 203 (d) or § 301 (d).

[51] "Intangible damage" is defined in section 101 (7) of Senate bill 945. The term generally encompasses all that is meant by the phrase "pain and suffering damage."

[52] *Id.* § 204.

[53] *Id.* § 302.

the risk of negligently causing damage to other motor vehicles in use. The bill specifically requires the insurance company which is writing basic economic loss coverage on the car to provide collision coverage if the owner wants it. For persons with older vehicles who do not want to pay premiums for collision coverage or for those persons with new cars who do not want to absorb the deductible costs if someone negligently damages their car, Senate bill 945 provides for so-called "inverse liability insurance" which would pay them for damage to their motor vehicle in use if caused by someone else who would have been liable but for the limitation on liability provided in the bill. This coverage resembles present uninsured motorist insurance whereby one's own company pays for the damage caused by an at-fault party who is uninsured.[54]

Availability of Benefits and Insurance. To assure the availability of basic economic loss benefits and to require each owner of an automobile to bear his fair share of the costs of compensation, Senate bill 945 requires each owner who operates a motor vehicle to take out a basic insurance policy to cover his own basic economic losses when operating his vehicle, those of any other driver or passenger in his vehicle, and those of any pedestrian injured by the vehicle. Each state would be required to set up its own procedures to guarantee that each person who registers and operates a motor vehicle in the state has purchased the necessary insurance.[55]

If insurance is made a necessary nationwide prerequisite to the operation of a motor vehicle, it is essential that the law guarantee that each person who has a valid driver's license and who can pay the premium be able to pay the necessary insurance. Senate bill 945 provides that any person or firm licensed to negotiate insurance policies in a state (*e.g.*, insurance agents) must issue the basic policy and any optional coverages selected by the owner or on behalf of a prescribed state plan (assigned risk pool, reinsurance facility, or other such plan). Thus, persons seeking insurance could walk into any establishment selling automobile insurance policies and receive coverage either through the voluntary market or a state plan meeting designated criteria. One of the criteria for a state plan is that the "rates shall not be greater than 200 per centum of the cost of comparable insurance for similarly situated persons who are able to obtain insurance in the voluntary market as estimated by the State insurance regulatory authority."[56]

---

[54]*Id.* § 111 (2).

[55]*Id.* § 102.

[56]*Id.* § 103 (b) (5).

Time of Benefit Payment. "Payments for net basic economic loss must be made periodically as loss occurs."[57] If an insurance company refused to pay a timely-made claim, the consumer could hire a lawyer to pursue the claim. So long as the claim was not fraudulent or so excessive as to have no reasonable foundation, the insurance company would be required to pay (1) costs of the attorney[58] and (2) interest on any unpaid claim that was determined subsequently to be due.

Primary vs. Secondary Benefits. In general, automobile insurance benefits under nationwide no-fault would be paid without regard to whether other insurance benefits were available. Social security disability benefits, however, would be paid first; and each state could be free to determine which, if any, state required benefits would be utilized to compensate injured accident victims before benefits under a no-fault policy would be paid (*i.e.,* a state would determine whether workmen's compensation benefits would be primary or secondary to the automobile no-fault insurance benefits).[59]

Coordination. Senate bill 945 authorizes the insurance regulatory authority, in order to coordinate benefits and eliminate double payments for the same loss, to establish a system of deductibles, waiting periods, or exclusions which would enable the individual consumer to coordinate his own benefits. Any such deductible, waiting period, or exclusion

---

[57]*Id.* § 104

[58]*Id.* §§ 105, 104(a)(1) & amend. 1351 (introduced by Senator Mondale). It should be noted that the attorney's fee must be "based upon actual time expended," thus effectually barring the contingent fee arrangement in litigation under nationwide no-fault. The most substantial justification for the contingent fee is that it permits poor citizens who have been wronged access to good private legal representation. But that justification is irrelevant under nationwide no-fault insurance which just as clearly permits poor citizens access to good private legal representation by requiring the insurer or self-insurer to pay the fees for that lawyer on an hourly fee basis. Congress has already acted to limit and control attorney's fees (the Federal Tort Claims Act limits contingent fees to 25 percent of the amount recovered), and the Supreme Court has ruled that the federal government, legislating within its constitutional authority, can require a state court to enforce federal statutory provisions related to reasonable attorney's fees. Testa v. Katt, 330 U.S. 386 (1947). Under the present system, the costs of pursuing a person's legal rights to compensation are placed directly and completely on the accident victim. The actual benefits the victim receives under the present system are reduced by the amount of money he must pay his attorney. By placing the costs of legal representation on the insurance company and the insurance mechanism, Senate bill 945 acts to give an insurance company much less incentive to deny a person's claim, since such a denial exposes him to the additional liability of paying the costs of the attorney retained to protect the rights of the consumer.

[59]S. 945, amend. 1374, 92d Cong., 2d Sess. (1972) (introduced by Senator Stevenson, D., Ill.).

would have to be reasonable in light of the purposes of automobile reform. One area in which partial exclusions of rather high deductibles might be permited would be the area of insurance covering motorcycles.[60]

State-to-State Variations Adjustment. By opting for a nationwide system of no-fault insurance under state regulation consistent with minimum standards rather than a national no-fault plan, Senate bill 945 accepts the inevitability of some state-to-state variation. However, the bill provides a solution to the problem that such variation may cause by mandating as a minimum standard that a policy of insurance covering a car registered in a particular state by operation of law contain insurance protection to afford a person operating that vehicle outside the state of registration the same protection he would have had in his own state.[61]

For example: A driver living in state *A* which does not permit lawsuits for damage to property is involved in an accident in state *B* where such lawsuits are permitted. There would be no reason for the state *A* driver to purchase property damage liability insurance in his own state, but he could be sued in state *B* for property damage. Under the bill, by operation of law, this driver's basic insurance policy would provide for liability protection against such a suit if he has an accident in state *B*. Only federal legislation can provide such a solution to state-by-state variations.

Consumer Information. It is tough for the average American consumer to pick and buy insurance policies intelligently. There is too much "mumbo jumbo" language in policies, too many variations in terms, clauses, and rates between different policies and sellers (insurance companies and agents), and often too much "mumbo jumbo" even to know the actual rate or price for the particular "brand name" being considered. Senate bill 945 requires, as a minimum standard, that the insurance regulatory authority of each state "provide the means to inform consumers about rates being charged by insurers licensed to do business in the State for qualifying no-fault policy coverages and mandatory optional coverages in order to permit consumers to compare prices."[62]

Rehabilitation of Auto Accident Victims. Each insurer is required to refer promptly each victim who is expected to be receiving economic loss benefits for more than three months to the state agency or agencies administering the state plan for rehabilitation services approved under the Vocational Rehabilitation Act. Those rehabilitation expenses, up

---

[60]*Id.* § 202 or § 301.

[61]*Id.* §§ 111, 202 (a) (8).

[62]*Id.*, amend. 1340 (introduced by Senator Stevens, R., Alaska).

to $25,000 under nationwide no-fault, must be paid by the insurer. If the victim refuses, without good cause, to utilize the rehabilitation services, the insurer may withhold up to 50 percent of his benefits for loss of monthly earnings. These provisions should shorten the amount of time that automobile accident victims are incapacitated and barred from normal lives, *provided* that adequate rehabilitation centers are in fact available. To the extent that such facilities are available and to the extent that individual common sense and the 50 percent withholding authorization lead to actual utilization of such services by victims, the total amount of insurance dollars paid to such persons (and in turn the premiums paid by all persons) should drop significantly.[63]

To provide the necessary means for adequate rehabilitation facilities nationwide, the bill presently requires, as a nationwide standard, that each state insurance regulatory authority *be authorized* to require each insurer to make investment of 1 percent of premiums collected each year (less premium taxes) from the sale of no-fault policies within the state in "the construction or improvement of rehabilitation facilities, in the development, expansion, or improvement of services to victims of accidental harm, and in research, training, and development of new rehabilitation techniques for victims of motor vehicle accidents" and via the state rehabilitation authorities "for the development, expansion, or improvement of rehabilitation services to handicapped individuals disabled in motor vehicle accidents and on research and development of new rehabilitation techniques and methods."[64]

Emergency Medical Services for Auto Victims. Projections from studies indicate that mortality from automobile accidents could be reduced by from 10 to 20 percent by proper medical care at the scene of the accident or enroute to a proper emergency health services facility. The Ambulance Association of America has estimated that 25,000 individuals are permanently injured or disabled each year as a result of inappropriate measures taken by untrained ambulance attendants and rescue workers. A recent study of automobile fatalities disclosed that 23 percent of the fatalities occurred when people sustaining survivable injuries received inadequate emergency transportation or health care treatment. The problem is especially acute in rural communities. The

---

[63]Although cost reduction is important, it is reduction of the human loss in today's highway slaughter that concerns me most. Full victim utilization of adequate rehabilitation services would make it possible for thousands upon thousands of people to return to a sound and healthy personal, family, community, and employment life.

[64]S. 945, amend. 1386, 92d Cong., 2d Sess. (1972) (introduced by Senators Cranston, D., Cal.; Williams, D., N.J.; Magnuson, D., Wash.; and Hart, D., Mich.).

National Academy of Sciences reports that 7 out of 10 motor vehicle deaths occur in rural areas and communities with populations of under 2,500. In California, for example, the death rate in automobile accidents according to a 1967 study, was 17 per 100,000 in urban areas, 46.8 in rural areas, and up to 85.5 in the mountains.

If emergency medical services for auto accident victims are improved and the number of persons killed and permanently incapacitated is reduced, the total amount of benefits paid out by insurers and paid in by consumers will drop. This goal is realistic and attainable.

Nationwide no-fault will pay promptly the costs of ambulance and hospital-emergency-room services. To provide the capital needed to expand the woefully inadequate emergency health services system, the bill requires as a minimum standard that each state authorize its insurance regulatory authority to require each insurer to invest 1 percent of collected no-fault premiums in emergency medical and transportation facilities, equipment, and programs.[65]

IV. How Much Will Nationwide No-Fault Cost?

Comparing the cost of the present automobile insurance system with the cost of auto insurance under Senate bill 945 is somewhat like comparing the cost of a Volkswagen with the cost of a Cadillac. They are different products. In comparing the cost of auto insurance under the present system and under nationwide no-fault, one must consider the value of each insurance package. No-fault insurance, like the Cadillac, is much more valuable than the present insurance system, or the Volkswagen. It assures a person prompt payment without regard to fault, and it provides insurance protection in adequate amounts to the person who purchases the insurance, and to his family and friends. By contrast, liability insurance protects the assets of a person in case he is sued and found to be negligent, but it does not assure him insurance protection for himself or his family when he or his family or friends are injured in an accident.

Another point to be considered is the influence that deductibles can have on premium costs. For example, assume that the motorist is a workingman whose employer provides a health insurance program and a wage continuation plan. Under a state plan that meets nationwide standards, this person could be allowed to choose a deductible in his automobile insurance policy and look to his employer-provided benefits for his first dollar losses rather than to his automobile insurance. His premiums under nationwide no-fault would be far lower

---

[65] *Id.*

than the actuarial projection of cost which does not consider the savings that could result from deductibles.

Nevertheless, the cost of nationwide no-fault auto insurance compares favorably with the present system. Opponents argue that in many states Senate bill 945 (or any similar bill) would produce drastic increases in premium costs. The actuarial projections received by the Committee on Commerce of the United States Senate do not support that argument.

Each of the three major trade associations in the automobile insurance business was invited to submit actuarial projections. The American Insurance Association projected an overall 6 percent per year savings in automobile insurance premiums. In a selected state-by-state breakdown, their savings estimates ranged from 1 percent to 6 percent. The American Mutual Insurance Alliance projected an overall cost savings of 2 percent per year. The National Association of Independent Insurers, represented by the Allstate Insurance Company, projected a nationwide increase of 18 percent per year. However, one of the largest members of that association (State Farm Mutual Insurance Company) submitted its own figures. The State Farm actuaries projected no change in premiums from the present system to nationwide no-fault.

There is evidence that all three groups have overstated the cost of nationwide no-fault, as demonstrated by the following four points.

(1) None of the actuaries calculated the savings that will result from the Department of Transportation bumper standard and the Motor Vehicle Information and Cost Savings Act of 1972.[66]

(2) None of the actuaries took into account the loss reduction potential in the area of motor vehicle safety. The rehabilitation services and emergency health services provisions of Senate bill 945, which have the potential of saving lives and of restoring victims to productivity (*i.e.,* no dependence on insurance benefits) were ignored altogether.

(3) The actuaries did not take into account the *social* savings to the American public that will come from reducing court loads, reducing the involvement of police officials in accident reporting and civil suit testimony, and simplifying accident reporting.

(4) These projections did not include the savings in cost resulting from making social security benefits primary. The Stevenson amendment would have made social security primary and produce an additional savings of from 3 to 5 percent.

The Massachusetts experience is an indication of professional actuarial bias toward higher rate projections than are warranted. At the

---

[66]*See* H.R. REP. No. 11627, 92d Cong., 2d Sess. (1972).

time of enactment of the Massachusetts limited no-fault law, insurance company actuaries projected a 15 percent reduction in premiums. In fact, the actual savings during the first year of operation of the plan were 42.6 percent.

Because no one can say for certain what the cost of nationwide no-fault will be until it is implemented, my colleague, the ranking minority member of the Committee on Commerce, proposed a very sensible amendment.[67] Senator Cotton's amendment would permit a state insurance regulatory authority to lower the benefit levels mandated for a state plan that meets nationwide no-fault standards if, on the basis of experience, costs rose in the particular state.

But even without this amendment, the dynamics of competition within the free enterprise system dictate that premiums will not increase in any state, in light of a letter addressed to the Committee by the president of one of the largest automobile insurance companies, one which does business in all 50 states. The letter declared:

> I can not speak for other insurance companies, but I can certainly assure you that the passage of this bill and conforming legislation in the States will not result in any increase in our automobile rates in any State for a typical policyholder buying full coverage. It is true that Aetna rates will be reduced more in some States than in others. We actively compete for automobile business in all States on this basis.[68]

V. Conclusion

The documented failure of the present system of tort and liability insurance to meet the need of American motorists and consumers for timely, adequate, and just compensation at reasonable premiums requires a change to a no-fault system of compensation for motor vehicle losses. That change, experience shows, will not occur soon enough or be adequate if left to the pace of state-by-state development, and the final result could well be 50 different and often incompatible state plans. Thus, nationwide legislation is needed to require the states to act in accordance with minimum standards. A bill reported favorably by the Committee on Commerce of the United States Senate meets these criteria. Senate bill 945 gives the consumer an automobile insurance product which is at least twice as valuable as the present product, and this improvement is possible without any increase in premiums.

---

[67]S. 945, amend. 1399, 92d Cong., 2d Sess. (1972) (introduced by Senator Cotton, R., N.H.).

[68]Letter from Donald M. Johnson, President, Aetna Life and Casualty Company, to Warren Magnuson, Chairman, Senate Committee on Commerce, July 28, 1972, in the files of the Committee.

THE MASSACHUSETTS EXPERIENCE UNDER NO-FAULT

*Eugene G. Coombs, Jr.**

No army can withstand the strength of an idea whose time has come. —Victor Hugo

The Massachusetts experience proves no-fault is an idea whose time has come.[1]

For the most part legislative support depended on a single factor — the hope, since established as fact, that the plan could cut automobile insurance costs. Other motivations commonly advanced to support the no-fault idea were relatively unimportant. It cannot be claimed, therefore, that the Massachusetts experience shows that no-fault itself is an idea whose time has come.[2]

The Massachusetts no-fault automobile insurance law was added to the pre-existing compulsory bodily injury liability insurance coverage in 1970 and became effective on January 1, 1971.[3] By subsequent legislation, no-fault automobile property damage insurance was added, effective January 1, 1972.[4]

The no-fault bodily injury coverage is known as "personal injury protection" coverage, and by the acronym PIP. The statute requires that policies issued in compliance with the compulsory law[5] provide for the payment of medical expenses, a portion of wages "actually lost" and not otherwise compensated, and actual payments for non-income producing services which the insured would have performed for himself or his family but for his injury. The total amount of benefits payable

---

*Member of Kansas and Massachusetts Bars and United States Supreme Court Bar. A.B. 1957, University of Kansas; LL.B. 1960, Harvard Law School. The author acknowledges with thanks the cooperation of Robert E. Keeton, David J. Lane, and John G. Ryan in the preparation of this article.

[1]Address by John G. Ryan, American Insurance Association Proceedings, New York City, May 18, 1972.

[2]Ryan, *Massachusetts Tries No-Fault,* 57 A.B.A.J. 431 (1971).

[3]MASS. GEN. LAWS ANN. ch. 90, §§ 34A, D, M, N (Supp. 1972); *id.* ch. 175, §§ 22 E-H, 113 B-C (1972); *id.* ch. 231 § 6D (Supp. 1972); Act of August 13, 1970, ch. 670, *as amended,* Act of August 23, 1970, ch. 744 [hereinafter cited as PIP Act]. Since 1927, proof of a bodily injury liability policy, or a substitute form of security, has been a condition to registration of a motor vehicle. MASS. GEN. LAWS ANN. ch. 90, § 1A (Supp. 1972).

[4]MASS. GEN. LAWS ANN. ch. 90, § 34 O (Supp. 1972); Act of November 3, 1971, ch. 978, *as amended,* Act of November 15, 1971, ch. 1079.

[5]MASS. GEN. LAWS ANN. ch. 90, § 1A (Supp. 1972).

for injury to or death of any one person is "at least two thousand dollars."[6] The coverage extends to the named insured and members of his household, any authorized operator or passenger of the insured's vehicle and any pedestrian struck by it, subject to certain exceptions and exclusions. There is no limitation upon the number of people entitled to benefits on account of any one accident, *i.e.,* there is no aggregate limit of liability. The coverage is required to extend to the named insured and members of his household if they are injured by a vehicle to which no PIP coverage applies.[7]

Section 4 of the PIP Act creates a limited exemption from tort liability which extends to the owner, registrant, operator or occupant of a motor vehicle having PIP coverage to the extent that the injured party is entitled to PIP benefits himself.[8] In other words, the responsible party, if he is entitled to PIP coverage himself, enjoys an exemption from tort liability for those items recovered by the injured person as PIP benefits which would otherwise have been items of special damages.

The practical effect of this exemption is undermined substantially by a provision for "subrogation" by the insurer paying PIP benefits to an injured person against the liability insurer of the tort-exempt wrongdoer. These inter-insurer claims are to be settled by agreement or, failing that, by arbitration on traditional fault bases.[9] Obviously, this is not subrogation as the word is generally understood,[10] but a wholly independent statutory right of recovery.

In addition to the limited exemption from tort liability created by section 4 with respect to items of special damages, section 5 of the Act limits the automobile accident victim's right to recover so-called general damages.[11] It provides that a plaintiff in a motor vehicle accident within Massachusetts may recover damages "for pain and suffering, including mental suffering associated with such injury," only if the "reasonable and necessary" medical expenses exceed $500 or the injury causes death, consists in whole or part of loss of a body member, or permanent or serious disfigurement, or loss of sight or hearing, or a fracture. This limitation on the recovery of general damages is not restricted expressly to those plaintiffs who are entitled to PIP benefits. However, dicta in *Pinnick v. Cleary*[12] seem to indicate that the Supreme Judicial Court finds this restriction implicit in section 5.

---

[6]PIP Act § 2, MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1972).
[7]*Id.*
[8]PIP Act § 4, MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1972).
[9]*Id.*
[10]BOUVIER'S LAW DICTIONARY 1143 (1946).
[11]PIP Act § 5, MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1972).
[12]271 N.E.2d 592, 597 (Mass. 1971).

The no-fault property damage insurance is called "property protection insurance" (PPI). It became effective on January 1, 1972, one year after the bodily injury law, and is also compulsory. It exempts Massachusetts owners and operators from liability to each other on account of damage to their respective vehicles, and provides a variety of options by which each vehicle owner may protect himself by first-party coverage.[13]

The constitutionality of the no-fault bodily injury law was upheld in *Pinnick v. Cleary*.[14] Detailed analysis of the Massachusetts PIP statute may be found elsewhere[15] and is beyond the scope of this article. The foregoing statements are intended to provide only the most general acquaintance with the statutes and to supplement the suggestion that the Massachusetts PIP law is most aptly called "limited" or "modified" no-fault.[16] The limited tort exemption is offset by the PIP insurer's "subrogation" rights against the tortfeasor's compulsory insurer.[17] The only practical limitations upon the law of damages are the pain and suffering "threshholds" established by section 5.[18] If this section contained the law's most significant change, it also provoked the most controversy. Focused upon it were the hopes of its advocates and the most bitter attacks by its opponents.

Before No-Fault

In 1927, the Massachusetts Legislature enacted the first compulsory automobile liability insurance statute in the United States.[19] Since that time, Massachusetts motorists have been required to provide evidence of bodily injury liability insurance in the amount of $5,000 per person, $10,000 per accident, as a condition to the registration of their motor

---

[13]MASS. GEN. LAWS ANN. ch. 90, § 34 O (Supp. 1972).

[14]271 N.E.2d 592 (Mass. 1971).

[15]Kenney & McCarthy, *No-Fault in Massachusetts Chapter 670, Acts of 1970 — A Synopsis and Analysis,* 55 MASS. L.Q. 23 (1970); Ryan, *No-Fault Automobile Insurance,* 17 BOSTON COLLEGE ANN. SURV. MASS. LAW 530 (1970); Note, *The Massachusetts "No-Fault" Automobile Insurance Law: An Analysis and Proposed Revision,* 8 HARV. J. LEGIS. 455 (1971).

[16]Pinnick v. Cleary, 271 N.E.2d 592, 595 (Mass. 1971): "[The act] establishes a modified system of compensation through their own insurers for victims of automobile accidents regardless of fault." *See also* Ghiardi & Kircher, *Automobile Insurance: An Analysis of the Massachusetts Plan,* 21 SYRACUSE L. REV. 1135 (1970); address by David J. Lane, Annual Seminars of the Society of Chartered Property and Casualty Underwriters, Los Angeles, Calif., Oct. 23, 1970.

[17]PIP Act § 4, MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1972).

[18]PIP Act § 5, MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1972).

[19]MASS. GEN. LAWS ANN. ch. 90, § 1A (1972).

vehicles. Until 1972, there was no such requirement with respect to property damage liability coverage.[20] Over the years, the state developed accident and claims frequencies which surpassed or rivaled the nation's highest.[21]

Needless to say, compulsory insurance rates did not remain constant under the circumstances. Sociologists, economists, and politicians have noted the existence of one large metropolitan area in a state that is otherwise largely rural. The classifications for compulsory automobile insurance rates take geographical considerations into account.[22] As a result, motorists in the Greater Boston area paid the highest premiums for their insurance. In the high rate territories in and around Greater Boston, the compulsory rates were more than five times those of the lowest rated territories.[23] If Boston had the greatest concentration of automobiles and motorists in the state, it also had the most voters and the largest newspapers.

The battle between the insurance commissioner and the industry over compulsory insurance rates was a long and bitter one even before 1967. Since 1961, an underwriting profit of 1 percent was allowed by the commissioner in setting rates for the compulsory coverage.[24] By statute, compulsory rates for the succeeding year were to be announced on or before September 15,[25] but the deadline was not always met.[26]

The compulsory rates were not determined by the industry subject to state approval, but were fixed by the commissioner. The compulsory insurance market[27] should be considered in at least two aspects. The one most generally considered is that of the policyholder — *i.e.,* every motor vehicle owner must have the insurance as a condition to the registration of his vehicle. The second aspect is that the insurance is compulsory upon the underwriter. Insurers in a compulsory state are required to accept every vehicle owner, where as insurers in non-compulsory states are not. This means that the worst class of drivers

---

[20]MASS. GEN. LAWS ANN. ch. 90, § 34 O (Supp. 1972).

[21]Information furnished by the Division of Insurance.

[22]*Id.*

[23]Boston Herald Traveler, July 9, 1968, at 1, 20. This situation persists. The present average rate for compulsory coverage in Boston is $73 and in Hyannis, $14. Information furnished by the Division of Insurance.

[24]Information furnished by the Division of Insurance.

[25]MASS. GEN. LAWS ANN. ch. 175, § 113B (1972).

[26]Court interpretation of these deadlines have held them to be discretionary. Doherty v. Commissioner of Ins., 328 Mass. 161, 102 N.E.2d 496 (1951); Liberty Mut. Ins. Co. v. Acting Comm'r of Ins., 265 Mass. 23, 28, 163 N.E. 648, 650 (1928). Such a delay in an election year could eliminate a political issue.

[27]CRANE, AUTOMOBILE INSURANCE RATE REGULATION 12-22 (1962).

is insured under a compulsory system, whereas that class in theory at least will be eliminated by underwriting judgment from a noncompulsory insurance system. Thus, the preexisting compulsory law was blamed for the state's high accident and claims frequencies as well as for every increase in rates. Regardless of the soundness of these assertions, they were widely voiced and the demands for change increased.

Two events in 1967 marked the beginning of the process of reform. First, the Keeton-O'Connell plan was passed by the Massachusetts House of Representatives.[28] Its passage in August 1967 seemed sudden and unexpected, without the advance warning of a long and heated public debate. It showed clearly the vulnerability to change of the 40 year-old compulsory law. Secondly, Commissioner of Insurance C. Eugene Farnam, by administrative regulation, prohibited any increase in compulsory insurance rates for the ensuing year.[29] This ruling was not challenged by the companies. Although the compulsory rates were frozen by the commissioner, rates for bodily injury liability coverage in excess of the statutory limits, and for medical payments, property damage liability, and physical damage coverages were subject to a "file and use" law.[30] Obviously this statute gave greater initiative and flexibility to the companies than was afforded them with respect to compulsory rates. The industry's decision to accept the commissioner's compulsory rate freeze in 1967 may have rested upon the desire to reduce the pressure for reform and to preserve their rating initiative for the noncompulsory coverages. It is also possible that the companies' experience would not have justified a substantial increase in the 1968 rates.[31]

The initial legislative steps in the reform process occurred in 1968. The first of these extended the commissioner's compulsory rate freeze through the years 1969 and 1970.[32] The second required insurers to offer excess bodily injury liability coverage up to the limits of $20,000/$50,000, $5,000 medical payments coverage, and $5,000 property damage liability coverage to their compulsory policyholders at rates promulgated by the commissioner.[33] This law was called the "Mary

---

[28]Boston Globe, August 16, 1967, at 1, cols. 4-5, at 5, cols. 1-4. It was defeated in the senate, 28 to 10. Boston Herald Traveler, September 19, 1967, at 1, 15.

[29]Appendix A.

[30]MASS. GEN. LAWS ANN. ch. 175, § 113C (1972).

[31]Boston Herald Traveler, December 13, 1967, at 1, 26; Boston Globe, December 22, 1967, at 1, 7.

[32]Ch. 643, § 2A [1968] MASS. ACTS, *as amended,* MASS. GEN. LAWS ANN. ch. 175, § 113B (1972).

[33]Ch. 643, § 3 [1968] MASS. ACTS, *as amended,* MASS. GEN. LAWS ANN. ch. 175, § 113C (1972).

Newman amendment,"[34] and its impact cannot be overestimated. Not only did it deprive the companies of the rate-making initiatives which they had previously held under the file-and-use provisions of section 113C and transfer this power to the commissioner, it virtually eliminated underwriting considerations from most of the important lines of automobile insurance. In previous years, the companies accepted substandard risks, either as assignments or in lieu of an assignment under the assigned risk plan, more or less as a necessary evil and a cost of doing business. Massachusetts motorists who were "assigned risks" were entitled to only compulsory $5,000/$10,000 bodily injury liability coverage from the insurer to which they had been assigned. If these motorists wished to obtain increased bodily injury limits, or property damage liability coverage, those coverages and others were offered by companies specializing in them, at higher rates. In a given year, a motorist considered to be a substandard risk might have found his automobile insurance to be written by three different companies under three separate policies. If the Mary Newman amendment reduced the possibilities of inequity and inefficiency which existed in these circumstances, it also gave the companies cause to ask what they had gained by accepting graciously Commissioner Fornam's rate freeze the year before. Then, as if to add insult to injury, the commissioner extended the "freeze" to all automobile liability rates, asserting that the Mary Newman law gave him this power.[35] This ruling was modified on appeal,[36] but the court decision came too late to materially affect rates for 1969.

In November 1969, Commissioner Farnam held hearings on proposed increases of 26 percent and 25 percent in property damage liability and medical payments coverages, the rates for which he was empowered to set by the Mary Newman amendment.[37] On Christmas eve, before the commissioner's findings had been announced, the companies filed an overall increase of 26.9 percent in physical damage rates, for use in January 1, 1970. Commissioner Farnam promptly rejected this filing and a refiling on December 30. It was perhaps more than coincidence that within the next two weeks, on January 12, 1970, he announced his

---

[34]Mary Newman served in the Massachusetts House of Representatives in 1953-54 and from 1957 to 1970. She has been Secretary of Manpower since 1971.

[35]Boston Globe, November 27, 1968.

[36]Insurance Rating Bd. v. Commissioner of Ins., 356 Mass. 184, 248 N.E.2d 500 (1969).

[37]Boston Globe, November 8, 1969, at 1, 5.

disapproval of the proposed rate increases for property damage liability and medical payments coverage.[38]

The commissioner's decision as to the physical damage rates was overturned by the Supreme Judicial Court in July of 1970,[39] and his decision on the property damage rates was overturned in early 1971.[40] But the effect of administrative determinations is not to be measured solely by their success in the courts. In the time between these two decisions, Massachusetts enacted its no-fault law.

In August 1970, three years had passed without a rate increase in any line of automobile insurance. The Keeton-O'Connell plan was the first "no-fault" reform program to be seriously considered by the Massachusetts Legislature. That plan continued to attract national as well as local attention. In 1967, it gained support from consumer groups and the news media, and was being reintroduced in the Great and General Court of Massachusetts annually. As originally filed, the Keeton-O'Connell plan did not alter the state's statutory rate-making process.[41] Keeton and O'Connell are law professors and might have been of a mind that state-made rates were not necessarily a bad thing.

If the Massachusetts automobile insurance industry opened its mind to reform early in 1970, nothing contributed more to its anxiety than the state-made rates — the 1967 rates still in effect in the summer of 1970. Whatever arguments might be made, pro or con, no logical necessity existed between no-fault insurance and any particular rating system. There were an ample number of alternatives to the Keeton-O'Connell plan.[42] Some of these alternatives may have persuaded at least segments of the Massachusetts insurance industry that a no-fault program was not the worst of the proposals then being advanced. The press began to report favorable industry consideration of "a modified no-fault plan."[43] The bill introduced as senate bill 1430, was reported to have

---

[38]Boston Globe, January 13, 1970, at 1, 4. Physical damage rates were not controlled by the Mary Newman law, ch. 643, § 2A, and were still subject to the file-and-use law, MASS. GEN. LAWS ANN. ch. 175A (1972). *See also* Boston Globe, July 23, 1970, at 25.

[39]Insurance Rating Bd. v. Commissioner of Ins., 260 N.E.2d 922 (Mass. 1970).

[40]Insurance Rating Bd. v. Commissioner of Ins., 268 N.E.2d 144 (Mass. 1971).

[41]H.R. 1844, Mass. Legis., 1964 Sess.; H.R. 4820, Mass. Legis., 1968 Sess.

[42]*E.g.*, the American Insurance Association Complete Personal Protection Plan. Boston Globe, February 18, 1970, at 22. Another proposal was for a $250 deductible on compulsory bodily injury liability coverage. Boston Globe, January 30, 1970, at 1, 4. Compulsory arbitration of bodily injury claims under $3,000 was also proposed. Boston Globe, January 16, 1970, at 34.

[43]Boston Sunday Advertiser, January 18, 1970; Boston Globe, February 25, 1970, at 10; Boston Globe, March 8, 1970, at 18.

been drawn by the Governor's staff, the Joint Legislative Committee on Insurance, and the Insurance Department. It was said to have the Governor's support and an industry guarantee that compulsory rates would be reduced 15 percent from the present level if the bill was passed as filed.[44] Neither senate bill 1430, nor the original Keeton-O'Connell bill, made provision for competitive rating. In most other respects, senate bill 1430 was substantially the same as senate bill 500, a bill with competitive rating provisions which had been filed annually since 1967 by the Massachusetts Association of Independent Insurance Agents and Brokers. If its competitive rating feature had initially won industry support for senate bill 500 over Keeton-O'Connell or other plans, the companies' hopes were frustrated again when senate bill 1430 was introduced. In the form of a substitute for a merit-rating bill, senate bill 1430 passed the house of representatives on July 29, 1970.[45] The senate made two amendments, passed the bill, and sent it to the Governor for his signature.[46]

The insurance companies originally supported the "modified no-fault" proposal, but they were less than gratified by the bill as passed by the senate. Two of the major companies immediately announced that they would stop writing automobile insurance in the state.[47] Their principal objections were to the senate's amendments to the bill. The amendments required 15 percent reduction not only in compulsory coverages, but to all automobile lines, and provided for "guaranteed renewability" of statutory policies. The senate's passage of the no-fault bill was surprising at first glance. Not only had the senate defeated the Keeton-O'Connell bill in 1967, it had twice rejected senate bill 1430 the week before.[48] The senate's sudden change of heart gave rise to speculation that political considerations were at work and that by passing an "unwise and unworkable" bill which was causing such consternation to the companies, the Governor could be embarrassed and forced to veto it in an election year.[49] Governor Sargent expressed an awareness of this possibility when he signed the bill into law in a prime time

---

[44]Boston Globe, May 8, 1970, at 3; Boston Herald Traveler, May 8, 1970, at 1, 8. Milton G. McDonald, the state's chief actuary, predicted a 30 percent increase in 1971 rates unless the system was changed. Boston Globe, June 24, 1970, at 1, 22.

[45]Boston Globe, July 30, 1970, at 16.

[46]Boston Globe, August 7, 1970, at 1, 15. The vote was 26 to 8. Nineteen Democrats voted for the bill and two voted against it.

[47]Boston Herald Traveler, August 8, 1970, at 1, 4. The ranks of discontented companies grew within the week. Boston Globe, August 11, 1970, at 1, 33.

[48]Boston Evening Globe, August 6, 1970, at 8.

[49]Boston Herald Traveler, August 8, 1970, at 8; Boston Globe, August 12, 1970, at 1, 8.

television speech on August 13, 1970.[50] Not only did he make the most of the rhetorical possibilities offered,[51] but he also introduced emergency legislation addressed to the companies' major objection to the guaranteed renewability provision added by the senate.[52] He threatened to keep the legislature in session until these amendments were adopted.[53] They were adopted the day after the threat, at 2 o'clock in the morning.[54]

The companies then challenged the validity of the statute's mandatory 15 percent reduction in the noncompulsory lines of automobile insurance.[55] Their attack was successful,[56] but the decision did not come until after Governor Sargent's reelection. As amended, by the legislature at the Governor's instance and the court at the companies' instance, the law became fully effective on January 1, 1971.

After No-Fault

Only one full year's statistical data is presently available for use in judging the performance of the Massachusetts statute. When the no-fault law went into effect on January 1, 1971, it was at compulsory coverage rates which were 15 percent lower than the 1970 rates — *i.e.,* 15 percent lower than the frozen 1967 rates — rather than the 30 percent increase in compulsory rates which Chief Actuary McDonald in May of 1970 had predicted would be necessary without reform.[57] In 1970, compulsory earned premiums had been roughly $150 million. Ignoring any increase in the number of vehicles, the 15 percent reduction would amount to a savings of $22.5 million. If Mr. McDonald's prediction was accurate, the 30 percent increase in compulsory rates would have produced total premiums approximately $45 million over the 1970 levels. Perhaps in spite of the history of the bill, its enactment nevertheless may be regarded as a legislative determination that this reduction in premium volume was a worthwhile objective.

---

[50]Boston Herald Traveler, August 14, 1970, at 1, 8.

[51]"I will not be blackmailed by an industry that has lived well and profitably in Massachusetts for many, many years. . . ." He also directed the Insurance Commissioner "to develop plans for a State Insurance Fund." Boston Herald Traveler, August 14, 1970, at 1, 8.

[52]Boston Globe, August 18, 1970, at 3.

[53]Boston Herald Traveler, August 22, 1970, at 1, 3.

[54]Boston Globe, August 23, 1970, at 1, 22.

[55]Boston Globe, August 26, 1970, at 35.

[56]Employer's Commercial Union Ins. Co. v. Commissioner of Ins., 265 N.E.2d 90 (Mass. 1970); Aetna Cas. & Sur. Co. v. Commissioner of Ins., 263 N.E.2d 698 (Mass. 1970); Boston Evening Globe, November 9, 1970, at 1.

[57]*Supra* note 45.

In the minds of the Act's proponents the justification for the original 15 percent reduction was its restriction upon the right to recover for pain and suffering.[58] The draftsmen also expected that since the recovery provided by the Act was certain, the number of claims would increase under no-fault. But the additional claims would be pure "no-fault" claims for out-of-pocket expenses, and this increase in costs would be more than offset by the cost savings resulting from the limitations on recovery for pain and suffering—more than offset, it was hoped, by about 15 percent.

The number of personal injury accidents, as reported to the Registry of Motor Vehicles, did not increase in 1971. Instead, it dropped by nearly one-third, from 91,142 to 61,014.[59] The number of reported non-fatal injuries dropped from 151,094 to 92,507.[60] As the statistics were developing in 1971, they did not escape the attention of the insurance commissioner and the legislature. In the late months of 1971, the commissioner ordered an average 27.6 percent reduction in the 1972 compulsory rates.[61] In turn, the legislature further amended the rating law[62] by authorizing the commissioner to hold public hearings to determine the extent of any unfair profit accruing to compulsory insurers on 1971 policies. After these hearings, on October 11, 1972, the commissioner ordered each insurer providing the compulsory coverage in 1971 to return to each policyholder a net amount equal to 25.9 percent of the compulsory premium.[63] No appeals were taken from this decision, which included the now customary 1 percent allowance for profit.[64] As a result, compulsory automobile insurance rates in 1971 and 1972 were some 37 and 38 percent, respectively, of the rates in effect between 1967 and 1970. When these reductions are coupled with the Supreme Judicial Court's determination of December 14, 1970, in *Travelers Indemnity Company v. Commissioner of Insurance,*[65] that the frozen 1967 compulsory rates were confiscatory and inadequate when extended into 1970, the results are even more dramatic. The draftsmen of the no-fault law had incorporated the 1970 compulsory insurance rating

---

[58] PIP Act § 5, MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1972).

[59] Appendix B.

[60] *Id.*

[61] Massachusetts Department of Banking and Insurance, Division of Insurance, Opinion, Finding and Order of December 31, 1971.

[62] MASS. GEN. LAWS ANN. ch. 175, § 113B (1972), *as amended* Acts of 1972, ch. 977 (Supp. 1972).

[63] Massachusetts Department of Banking and Insurance, Division of Insurance, Opinion, Findings and Orders of October 11, 1972.

[64] MASS. GEN. LAWS ANN. ch. 175, § 113B (Supp. 1972).

[65] 265 N.E.2d 90 (Mass. 1970).

table into the statute,[66] and mandated a 15 percent reduction from those rates. The companies did not seek a retroactive adjustment of 1970 compulsory rates after the *Travelers* decision. Thus the 1971 and 1972 rates are fractions of rates adjudged inadequate and confiscatory for 1970.[67]

The reduction in the rate levels for compulsory coverage after no-fault has been due to the anticipated reduction in average paid claim costs[68] and the unexpected reduction in the number of claims.[69] The reduction in average paid claim costs, at least in the first full year of no-fault, would seem to be primarily the result of the restrictions imposed upon recovery for pain and suffering by section 5. There are present indications that the companies' loss adjustment expenses are declining under no-fault. Obviously, a no-fault claim does not require as extensive an investigation as that required under the fault system. Medical bills and reports and lost earnings records are obtained with the claimant's cooperation[70] rather than by negotiation with his attorney and discovery procedures if suit is brought. Claims for no-fault benefits generally are being adjusted without the necessity of either the claimant or the company resorting to the services of attorneys. These savings to the companies in loss adjustment expenses are expected to result in further rate reductions beginning in 1973.[71]

The reasons for the reduction in the number of bodily injury claims are more difficult to explain. The figures provided by the Registry of Motor Vehicles show no reduction in the number of fatalities in 1971. Indeed, the number of fatalities in 1971 was slightly higher than in any year since 1965.[72] Even claims adjusters will concede that death is one injury which will not be faked. The absence of a reduction in the number of fatalities leads one to doubt that the number of highway accidents in 1971 did in fact decline. Furthermore, state officials privately assert knowledge that the number of accidents actually increased in 1971. Despite the arguments sometimes made to the contrary, there is no reason to believe that no-fault legislation

---

[66]PIP Act § 6, Acts of 1970, ch. 670, § 6, *as amended,* Acts of 1970, ch. 744, § 2.

[67]In contrast to this reduction in the compulsory rates, property damage liability rates were increased by the commissioner an average 38.1 percent following the Supreme Judicial Court's decision in Aetna Cas. & Sur. Co. v. Commissioner of Ins., 263 N.E.2d 698 (Mass. 1970).

[68]Appendix C.

[69]Appendix B.

[70]PIP Act § 4.

[71]Conversation with John G. Ryan, Commissioner of Insurance.

[72]Appendix B.

suddenly changed the driving habits of some two million motorists, for better or worse.

If it is true that the number of actual highway accidents did not diminish substantially in 1971, then the Registry of Motor Vehicles statistics on reported personal injury accidents must mean that prior to no-fault some people who were not seriously injured were utilizing the automobile reparations system. It is certainly true that some motorists who were entitled to a recovery of general damages prior to the Act now are not. Despite the complaints and charges by opponents of no-fault, there is no evidence in the news media nor the insurance division records of widespread public dissatisfaction with this result. This may mean only that there are more motorists who pay insurance premiums in the state than there are accident victims. On the other hand, it may indicate that instances of real hardship caused to accident victims by the limitations on the recovery of general damages have been extremely rare.

Conclusion

The first published statistical study of the results of the first full year of Massachusetts' no-fault experience of which the author is aware is that by Dr. Calvin Brainard which appears in this symposium.[73] The Council on Law-Related Studies in Cambridge is conducting a large-scale survey of the effects of the Massachusetts plan, not only on accident victims and insurance companies, but on attorneys, insurance agents, adjusters, and management personnel as well. The first results of this survey are expected early in 1973.[74]

Casualty underwriters generally hold that 3 years' experience is necessary to give confidence in the equity and reliability of a particular rate.[75] Nevertheless, the short-run results of the plan as reflected in the data now available must be gratifying to its proponents and to those in industry and government who worked so hard to implement the law in the short period between its passage and its effective date.

In light of the history of its enactment, a couple of caveats are worth suggesting. One cannot conclude that the enactment of this law in another state would produce results as dramatic as the results in the first year of the Massachusetts experience. Nor does the Massachusetts experience demonstrate that none of the alternate no-fault plans then

---

[73]*See* Brainard, *The Impact of No-Fault on the Underwriting Results of Massachusetts Insurers*, 44 Miss. L.J. 174 (1973).

[74]A similar study is underway in Florida. Information provided by the Council on Law-Related Studies, 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

[75]Information provided by the Division of Insurance.

or now being considered could not have effected results at least as promising. As Commissioner Ryan noted,[76] legislative support for the Massachusetts plan was based primarily upon its projected cost reductions rather than other arguments advanced in favor of no-fault legislation.[77] If the substantial rate reduction in Massachusetts is due primarily to the Act's restrictions upon the recovery of general damages, perhaps other proposals with more extensive restrictions might result in even greater savings. The Massachusetts statute presents a great many problems of construction and interpretation which have yet to be resolved by the legislature or the courts,[78] an additional indication of the crisis and confusion surrounding its enactment.

The phrase "no-fault insurance" is now applied to such a wide variety of proposals that it has lost virtually all substantive connotations. The political popularity of the term, like the term ecology, does not serve to advance consideration of specific proposals.[79] The Massachusetts statute certainly was more than a legislative accident, notwithstanding a quip by Governor Sargent after his reelection in 1970, "I am here through no fault of my own." Certainly the better time for reasoned evaluation of the present automobile reparations systems and the proposals for reform is before a crisis in the system makes dramatic change inevitable. That is one lesson of the Massachusetts experience.

---

[76]Ryan, *supra* note 2.

[77]Among the other arguments were elimination of court congestion, delays, and inequities in the traditional reparations system. Note, *The Massachusetts "No-Fault" Automobile Insurance Law: An Analysis and Proposed Revision, supra* note 15, at 455-58.

[78]Kenney & McCarthy, *supra* note 15; *Note, The Massachusetts "No-Fault" Automobile Insurance Law: An Analysis and Proposed Revision, supra* note 15.

[79]Address by Bernard L. Webb, "No-Fault Insurance and the Lemming Syndrome," at the Seminar on No-Fault Insurance, of the Society of Chartered Property and Casualty Underwriters, New Orleans, La., Nov. 18, 1971, quoting Herbert S. Denenberg, "The Politics of No-Fault Automobile Insurance: The People vs. the Trial Lawyers," an address before the National Governor's Conference, San Juan, Puerto Rico, Sept. 14, 1971.

APPENDIX A

The following memorandum, dated February 7, 1968, was issued by the Massachusetts Commissioner of Insurance C. Eugene Farnam. The memorandum was prepared in regard to classifications of risks and schedule of premium charges for motor vehicle liability policies or bonds in 1968:

> Massachusetts General Laws Chapter 175, Section 113B, requires the Commissioner of Insurance, after due hearing and investigation, to fix and establish fair and reasonable classifications of risks, and adequate, just, reasonable and non-discriminatory premium charges to be used by insurance companies in connection with the issue of execution of motor vehicle liability policies or bonds, both as defined in Section 34A of Chapter 90.
>
> On January 26, 1968, a public hearing was held after advertising in the newspapers in the various cities and towns listed in said Section 113B.
>
> At the public hearing, a stenographer who was duly sworn made a complete record of the proceedings. Statistics, data, and argument concerning the computation and preparation of the proposed classifications of risks and schedule of premium charges to be used by insurance companies for the year 1968 were introduced in evidence before me.
>
> I have given careful consideration to all of the evidence presented at the hearing, and on the basis of that evidence, I find that —
>
> 1. the proposed classifications of risks are fair and reasonable and the premium charges relating thereto are adequate, just, reasonable and non-discriminatory, and
>
> 2. the proposed rules and regulations are reasonable and necessary to facilitate the operation of said Section 113B and to enforce the application of the classifications and premium charges fixed and established.
>
> NOW, THEREFORE, I do hereby establish and promulgate for the year 1968 the classifications of risks, schedule of premium charges relating thereto and rules and regulations, all as set forth in the Finding and Order dated December 29, 1966, said Finding and Order containing the classifications of risks, schedule of premium charges relating thereto and rules and regulations applicable to motor vehicle liability policies or bonds issued or executed for or during the year 1967, except that Table A on page 58 of the said Finding and Order is hereby amended as follows:

TABLE A

Expected Loss Factors Applicable to Policy Year 1968 for Statutory (Compulsory) Liability Coverage

	1964	1965	1966
All Classifications	.654	.654	.654

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
REGISTRY OF MOTOR VEHICLES
STATISTICIAN'S OFFICE
BOSTON, MASSACHUSETTS

PERSONAL INJURY ACCIDENTS BY MONTHS: 1966 THROUGH 1971

MONTHS	1966	1967	1968	1969	1970	TOTALS	AVERAGE	1971
January	8,282	5,962	10,033	6,580	9,544	40,401	8,080.2	6,136
February	7,044	8,426	7,613	6,877	7,347	37,307	7,461.4	5,077
March	6,085	7,843	7,496	6,554	7,740	35,718	7,143.6	4,460
April	6,527	6,573	6,073	5,979	6,348	31,500	6,300.0	4,695
May	7,214	7,018	7,109	6,881	7,387	35,609	7,121.8	5,391
June	6,963	6,760	7,505	6,425	7,457	35,110	7,022.0	4,985
July	6,532	6,113	6,187	6,590	6,702	32,124	6,424.8	5,035
August	6,799	6,597	6,567	6,886	7,278	34,127	6,825.4	5,109
September	6,831	6,665	6,752	7,208	7,096	34,552	6,910.4	4,475
October	7,546	6,665	6,976	7,943	7,621	36,751	7,350.2	5,059
November	7,303	7,772	7,866	8,442	7,238	38,621	7,724.2	5,019
December	8,887	7,109	8,461	9,184	9,384	43,025	8,605.0	5,573
Total Accidents	86,013	83,503	88,638	85,549	91,142	434,845	86,969.0	61,014
Persons Injured Non-Fatally	148,357	140,399	144,509	136,540	151,094	720,899	144,180	92,507
Persons Injured Fatally	900	867	897	898	904	4,466	893	908
Total Injured	149,257	141,266	145,406	137,438	151,998	725,365	145,073	93,415
Persons Injured per accident	1.735	1.692	1.640	1.607	1.668	1.668		1.531
Percentage Persons Injured Fatally	0.603%	0.614%	0.616%	0.653%	0.595%	0.615%		0.972%

APPENDIX C

The following statistics, revised August 1972, were provided by the Massachusetts Automobile Rating and Accident Prevention Bureau, Boston, Massachusetts.

PRIVATE PASSENGER – COMPULSORY

Losses Incurred Inclusive of Allocated Claim Expense
Valued as of March 31, 1972 for Policy Year 1971
and as of December 31, 1971 for Policy Years 1966-1970

Policy Year	Earned Car Years	Compulsory Premium	Losses Incurred	*No. of Claims	Claim Freq.	Ave. Claim Cost	Pure Premium	Loss Ratio
1971	1,957,232.4	111,218,794	44,669,699	55,044	*	*	22.82	40.2
1970	1,959,529.2	130,633,902	98,522,664	119,353	6.1	825	50.28	75.4
1969	1,888,593.8	126,036,229	97,578,851	123,393	6.5	791	51.67	77.4
1968	1,816,003.9	121,839,805	94,091,726	121,177	6.7	776	51.81	77.2
1967	1,758,012.6	118,501,317	85,386,422	114,977	6.5	743	48.57	72.1
1966	1,711,430.1	110,240,158	86,476,367	120,956	7.1	715	50.53	78.4
			**Developed					
			Losses Incurred	*No. of Claims				
1971	1,957,232.4	111,218,794	48,877,585				24.97	43.9
1970	1,959,529.2	130,633,902	99,192,618	117,813	6.0	842	50.62	75.9
1969	1,888,593.8	126,036,229	97,051,925	122,184	6.5	794	51.39	77.0
1968	1,816,003.9	121,839,805	93,856,497	120,426	6.6	779	51.68	77.0
1967	1,758,012.6	118,501,317	85,207,111	114,517	6.5	744	48.47	71.9
1966	1,711,430.7	110,240,158	86,398,538	120,690	7.1	716	50.48	78.4

*1971 No. of Claims are Division 2 only prior to Inter-Company Settlement.
Note: Policy Year 1971 Private Passenger experience excludes P.I.P. deductibles.

**Development Factors			
Losses Incurred		Number of Claims	
1971	1.0942	(1971	1.0240)
1970	1.0068	1970	.9871
1969	.9946	1969	.9902
1968	.9975	1968	.9938
1967	.9979	1967	.9960
1966	.9991	1966	.9978

Author's Note: "No. of Claims" for 1971 includes only no-fault claims and not third party claims, *i.e.*, bodily injury claims where one of the threshholds required by section 5 is needed or claims for special damages not compensated by no-fault benefits. Therefore, it is the expectation of the Insurance Division that additional 1971 claims will be reported in the future. If these 1971 claims are reported, "Claim Frequencies" are increased and "Average Claim Costs" are decreased.

THE IMPACT OF NO-FAULT ON THE UNDERWRITING RESULTS OF MASSACHUSETTS INSURERS

*Dr. Calvin H. Brainard**

For many years prior to 1971, insurers as well as motorists were dissatisfied with the performance of the Massachusetts automobile liability insurance market — insurers because prices were too low and motorists because prices were too high.

With the advent of no-fault automobile insurance, effective January 1, 1971, Massachusetts motorists received a reduction of 15 percent in their compulsory bodily injury liability rates (Coverage A) and shortly will receive a further rate reduction of 27.6 percent in the form of a retroactive premium refund. The overall reduction will be 38 percent.[1] As to Coverage A, therefore, no-fault can be credited with a considerable mitigation of motorist dissatisfaction with price.

The purpose of this article is to examine the other side of the market — the effect of no-fault on the costs and profit margins of Massachusetts insurers of automobiles.

Underwriting Results Under No-Fault, 1971

The Results of Ten Leading Insurers

As indicated in Table 1, no-fault produced very gratifying underwriting results for Massachusetts insurers in 1971 with respect to the statutory Coverage A.

Despite a rate reduction of 15 percent, the 10 leading insurers— who wrote about 70 percent of the total volume of Massachusetts automobile insurance — earned premiums of $76.7 million while incurring losses of only $28.9 million. The gross margin from insuring operations (not including selling and administrative costs and taxes) was $47.8 million or 62 percent of earned premium income. Compared with the experience of prior years, this margin tells a rags-to-riches story. While the margin varied from 69 percent (Lumbermens) to 49 percent (Hartford), all insurers benefited handsomely from the turnabout.

---

*Professor of Finance and Insurance, University of Rhode Island. A.B. 1935, Columbia University; M.B.A. 1948, Ph.D. 1951, New York University.

[1]In 1970, the schedule of Coverage A rates, basic limits, ranged from $24 to $375. Therefore, the savings produced by a 38 percent rate reduction would range from $9 to $143.

TABLE 1[2]

UNDERWRITING RESULTS OF TEN LEADING INSURERS:
COMPULSORY COVERAGE A, 1971*

Insurer	Premiums** (millions)	Losses*** (millions)	Loss Ratios (percent)
Travelers	$16.7	$ 5.4	32
Liberty Mutual	12.6	4.3	34
Aetna Casualty	9.7	3.9	41
Employers Commercial	8.5	3.2	38
Lumbermens Mutual	7.4	2.3	31
Hartford Fire	5.1	2.6	51
Fireman's American	4.6	2.3	51
Allstate	4.6	1.7	37
Royal-Globe	3.8	1.8	49
Sentry	3.7	1.4	38
Totals	$76.7	$28.9	38

*Policy year 1971 valued as of March 31, 1972.

**Earned premiums reflect the initial 15 percent rate reduction but not the 27.6 percent retroactive refund.

***Incurred losses inclusive of allocated claim expense.

To be sure, a decree of the Massachusetts Insurance Department, which was upheld in the courts last summer,[3] will necessitate a premium refund to motorists of 27.6 percent and this will reduce the $76.7 million of earned premiums to $56.2 million. Even then, however, the margin for expenses and profits will be a comfortable 48 percent of premiums.

Industrywide Underwriting Results

The aggregate overall results in 1971 for all insurers of Massachusetts private passenger automobiles were: earned premiums $111.2 million; incurred losses, $48.9 million; expenses, $33.9 million; gross profit, $27.2 million; profit margin, 24.6 percent of earned premiums.[4]

[2]Massachusetts Automobile Rating and Accident Prevention Bureau, August 28, 1972.

[3]Employers Commercial Union Co. v. Commissioner of Ins., 283 N.E.2d 849 (Mass. 1972).

[4]Massachusetts Automobile Rating and Accident Prevention Bureau and State Insurance Department analyses, September 8, 1972. The incurred losses include allocated claim expense and are developed to maturity by a factor of 1.0942.

Profit margins for other classes of business were: 34 percent for commercial vehicles, 29 percent for taxicabs, and 21 percent for automobile dealers and garages.

Premium refunds will of course be forthcoming in compliance with state rate regulatory laws which require that rates be fair, reasonable, and not excessive from the standpoint of underwriting profitability. Nevertheless, these margins indicate how quickly and decisively no-fault restored profits to the underwriting of Coverage A.

Comparison of Underwriting Results, 1971 and Prior Years

Table 2 compares the underwriting results of 1971 with those of the 3 preceding years and clearly indicates the vast improvement in experience which took place in 1971 during no-fault's first year of operation. And this improvement occurred despite the 15 percent rate reduction mandated for that year.

TABLE 2[5]

COMPULSORY COVERAGE A UNDERWRITING RESULTS, ALL INSURERS: PRIVATE PASSENGER AUTOMOBILES, 1968 - 1971

Policy Year	Premiums*	Losses*	Gross Margin*	Loss Ratios
1971	$111.2	$48.9	$62.3	44%
1970	130.6	99.2	31.4	76
1969	126.0	97.1	28.9	77
1968	121.8	93.9	27.9	77

*Earned premiums, incurred and developed losses including allocated claim expense, and gross margins (before expenses) are in millions of dollars.

Had the same rates been in effect in 1971 as in 1970, the experience for 1971 would have been: premiums, $130.6 million; losses, $48.9 million; gross margin (before expenses), $81.7 million; and loss ratio, 37 percent. That is, when 1971's premiums are adjusted to the rate levels that existed in 1970 — to introduce inter-year comparability — no-fault (or factors associated with it) is seen to have cut the loss ratio in half and to have increased the gross margin 2½ times.

So far as Coverage A is concerned, insurers seem to have found in no-fault an Aladdin's lamp with which to transmute into gold the leaden experience of one of the nation's most difficult insurance markets.

[5]Massachusetts Automobile Rating and Accident Prevention Bureau, August 28, 1972.

Explanation of 1971's Underwriting Results

Original Assumptions Concerning Cost Reduction Through No-Fault

From the legislative beginnings of Massachusetts' reparation reform movement in 1967, no-fault quickly became identified in the public mind with cost reduction in the sense of lower premium rates. Recent legislative history demonstrates that this identity was essential to the success of the movement. No true no-fault law has been enacted in any state without the mandating (or at least the firm promise) of immediate cost savings. The reason for this is clear. Whereas reparation reform affects only the unfortunate minority who suffer significant injury, rate reductions benefit all motorists.

For the most part, the public appears to have accepted the cost-saving promise of no-fault on faith. How can a system which pays benefits to all injury victims, without regard to fault, cost less than one which pays benefits only to the limited number of victims who are eligible for benefits under tort law? To this question motorists would be most likely to respond that it reduces legal costs.

Actually, a more important reason is the reduction in pain and suffering (general damages) benefits which insurers effect through no-fault's medical expense threshold. However, even the complete answer — that no-fault reduces legal expense *and* general damages — is vulnerable to the more searching question: How can one be sure that this joint reduction in costs will exceed the increase in costs resulting from paying all victims regardless of fault? As actuaries themselves arrived at conflicting answers to this question, motorists in general could only accept the cost-saving argument of no-fault on faith.

Before the 1971 Massachusetts no-fault law became effective, the actuarial advisory committee to the Rating Bureau had, of course, to supply a reasonable factual basis for the law's mandated rate reduction. This it did on the basis of two assumptions which evolved from various reparations cost studies made since 1967 by insurer associations, actuarial consultants, and the Department of Transportation.

First, it was assumed that the number of injury claimants eligible for payment under no-fault would be about 30 percent greater than those eligible for payment under liability insurance in 1970. Second, it was assumed that the reduction in legal expense and general damages effected through no-fault would reduce the average cost of each claim by about 36 percent. From these two assumptions it followed that costs overall would fall by 15 percent and that, in consequence, rates could be reduced by a similar percentage.

In sum, no-fault would be cost increasing as to the number of payable claims but cost reducing as to the average amount payable per claim, and the latter effect would predominate over the former effect by a postive balance of 15 percent. This analysis, which was favored then as now in all logic, is worth bearing in mind because 1971's actual results in Massachusetts proved to be radically different from the expected results.

Actual Causes of Cost Reduction in Massachusetts in 1971

Reduction in the Number of Claims. In 1970, under tort liability, insurers of private passenger automobiles processed 119,353 Coverage A injury claims.[6] In principle, if not always in practice, these were tort-eligible claims only— that is, claims made against negligent motorists and their insurers by innocent victims.

In 1971, under no-fault, it was assumed, as indicated above, that 1970's claim count would increase by about 30 percent or from 119,353 to 155,000 claims.

Actually, the unexpected and as yet unanalyzed result of no-fault in 1971 was to reduce the number of claims dramatically from 119,353 to about 69,000. Instead of an increase of 30 percent in claims, there was a decrease of over 40 percent. The favorable underwriting results enjoyed by Massachusetts insurers in 1971 are due almost exclusively to this windfall reduction in claims.

This reduction is all the more mysterious because there can be little doubt that, as intended by the new law, many injury victims who in 1970 would have been denied a claim under tort liability, were made eligible to present and did in fact present claims in 1971 under no-fault. The number of such additional (newly eligible) claims was about 38,000. Since 38,000 is approximately 30 percent of the 1970 claim count of 119,353, the original actuarial assumption that no-fault would extend claims eligibility to about 30 percent more victims was quite accurate so far as it went.

In 1971, if no-fault accorded claims eligibility to 38,000 victims (*e.g.,* drivers in single-car accidents) who would have been denied claims eligibility under tort in 1970, we may assume — given little change between the two years in the total number of injury victims, which seems reasonable — that in 1970 as in 1971, there were 157,000 injury victims in all. Of this number, 119,000 would have been tort-eligible

[6]It is expected that by the time all claims have been settled, in the next few years, the number actually paid will reduce from 119,353 to 117,813. These and subsequent data are drawn from various exhibits compiled by the Massachusetts Automobile Rating and Accident Prevention Bureau.

victims and 38,000 would not have been tort-eligible. However, the latter would be claims eligible under no-fault. If to this analysis we add two known dimensions — that claims in 1970 were 119,000 and only 69,000 in 1971 — we develop the statistical picture presented in Table 3.

TABLE 3

A Comparison of Injured Victims and Coverage A Claims: 1970 vs. 1971

Victims & Claims	1970 (Tort)	1971 (No-Fault)	Change
TEV*	119,000	119,000	n.c.
Claims	119,000	31,000	−88,000
TIV**	38,000	38,000	n.c.
Claims	0	38,000	+38,000
Total Victims	157,000	157,000	n.c.
Total Claims	119,000	69,000	−50,000

*TEV: Tort-eligible victims, those who are eligible to claim injury benefits under liability insurance in accordance with tort law.

**TIV: Tort-ineligible victims, those who are not eligible to claim injury benefits under liability (*e.g.*, drivers in single-car accidents) but who are eligible to claim under no-fault.

The last column in Table 3, entitled "Change," propounds the mystery of the "vanishing claimant" in Massachusetts in 1971 under no-fault. The true measure of that phenomenon is not the 50,000 reduction in total claims but rather the 88,000 (74 percent) reduction in claims of victims injured under such circumstances as, in 1970, would have led to benefit entitlement under tort liability. Paradoxically, the vanishing claimants appear to be the innocent victims of negligent motorists.

The assumption that there really were 157,000 injury cases in 1970 and 1971 could, of course, be challenged. For example, let us assume instead, and rather extremely, that in both years there were only 69,000 genuine injury cases of which 31,000 were truly tort eligible and 38,000 were not. This hypothesis explains the 1971 claim count. However, it also implies that in 1970, insurers honored 88,000 tort claims which were spurious, and that no-fault's primary utility lies in its capacity to curb fraud.

On the other hand, if we accept the assumption of 157,000 genuine injuries, then no-fault had its major impact in inducing 88,000 legitimate

victims either to assume their own losses or to transfer them exclusively, and without regard to entitlement, to benefit systems other than automobile insurance.

That 88,000 tort eligible victims did not present claims in 1971 might be rationalized in terms of the $500 medical expense threshold which is contained in the Massachusetts law. That is, the less seriously injured victims — who comprise a large majority of the total injury cases — would not be entitled to general damages in 1971 as they were in 1970, and consequently their propensity to claim was diminished. Nevertheless, such victims would still be entitled to claim for economic loss, and further, because they were the innocent victims of negligent motorists, their claims would be charged through subrogation and intercompany settlements to the policies of the offending motorists rather than to their own policies. It is scarcely credible, therefore, that the no-fault threshold, which was designed to limit the number of victims entitled to claim general damages, should have reduced by 88,000 the number of victims entitled to claim economic loss benefits.

Further research may eventually and satisfactorily explain this extraordinary decrease in claims which was the principal cause of the favorable underwriting results produced by no-fault in 1971. Until then, the Massachusetts results will provide an unreliable basis for predicting the effect no-fault may have on costs in other states.

Reduction in the Average Claim Cost. In 1971, no-fault also produced a reduction in the average claim cost, including allocated claim expense. Compared to the average claim cost of $825 in 1970, the cost in 1971 was estimated to be about $660. This is a reduction, however, of only 20 percent, or approximately one half the expected reduction on which the original 15 percent rate cut was predicated.

The medical expense threshold of $500 converted many claims from a full legal damages basis to a limited economic loss basis of settlement with consequent savings in general damages and legal expenses. But the savings were far less than had been contemplated. In fact, had the number of claims increased by 30 percent as expected, a reduction of only 20 percent in the average claim cost would have faced insurers with ruinous loss ratios in excess of 90 percent and the cause of no-fault reform would have faltered badly.[7]

In the past, actuaries have assumed that cost savings under no-fault would stem exclusively from major reductions in the average claim

[7]It should be noted, however, that if the number of claims had increased by 30 percent, the average claim lost would undoubtedly have been appreciably less than $660.

cost. The Massachusetts experience shakes this assumption. Cost savings have come predominantly from reductions in the number of claims and only secondarily from reductions in average claim cost.

Conclusions

No-fault automobile insurance, considered as a cost-reduction device, proved highly successful in Massachusetts in its first year of operation, 1971. It produced a complete financial turnabout for insurers of the statutory Coverage A (compulsory bodily injury liability insurance).

In the private passenger automobile classification, which constitutes more than 90 percent of the total automobile insurance business in Massachusetts, incurred losses fell from $99,193,000 in 1970 to $48,878,000 in 1971, a reduction of $50,315,000 or 51 percent. As no-fault's mandated rate reduction diminished earned premiums by only 15 percent, insurers obviously gained substantially.[8]

The source of prosperity for insurers was a windfall. The number of claims which had been expected to rise by 30 percent actually fell by 42 percent. The reasons for this dramatic reversal in what was for many years an extremely high claims-conscious territory have not yet been analyzed, and the phenomenon must still be viewed as a mystery.

Contributing to the insurers' improved experience was a reduction of 20 percent in the average claim cost. But this source of gain, which is axiomatic under any no-fault law containing an appreciable medical expense threshold, fell far short of expectations.

In brief, Massachusetts no-fault produced for insurers the result they desired, but for the wrong reasons. Whereas a 36 percent reduction in average claim cost was expected to overcome a 30 percent increase in the number of claims, no-fault actually achieved cost savings primarily by reducing the number of claims. Claims fell by 42 percent whereas the reduction in average claim cost was only 20 percent.

Insurers in Massachusetts may acclaim no-fault solely for the underwriting results achieved and regardless of cause. But those who are charged with responsibility for predicting no-fault cost results in other states may be made uneasy by the Massachusetts experience, which failed of expectations as to claims and claims costs by a wide margin.

---

[8]After the premium refund of 27.6 percent is effected, the overall reduction in earned premiums will be 38 percent.

Will you miss the latest decisions?

MISSISSIPPI SUPREME COURT DECISIONS AVAILABLE

Be informed and keep your research up to date. Subscribe to the **Mississippi Law Journal** briefs of decisions of the Mississippi Supreme Court. Briefs are written by **Journal** members and mailed by Friday of the week the decisions are rendered, several weeks before the cases are printed in the regional reporter. You can receive this weekly publication and be up to date for only $15.00 per year—an indispensable service! Subscribe now, or write for a free sample of the most current briefs.

Send Subscription Order to
MISSISSIPPI LAW JOURNAL
P. O. Box 146
University, Mississippi 38677

Helping you serve your clients' trust

The financial advice and counseling you give determines your clients' future. That is why you should know about the many ways the Trust Department of First National Bank can help you serve your clients better. Whether it be retirement plans, estate planning, investment management, or other fiduciary services, call on our experienced trust men to help you plan a better future for your clients.

First National Bank

JACKSON, MISS. MEMBER: FDIC

Branches: Commercial National Bank, Greenville/Leland; First National Bank, McComb; The Bank of Greenwood, Greenwood; Amite County Bank, Gloster/Liberty; Tylertown Bank, Tylertown.

BIRMINGHAM PUBLISHING